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Regulating Religious Organizations Under the Establishment Clause

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INTRODUCTION

The one aspect of church and state relations about which there is currently little dispute is that contacts between the two are increasing.[1] Activities of religious organizations, previously untouched, are now becoming subject to government regulation.[2] At the same time, the activities of religious organizations are expanding.[3] Religion in politics,[4] business,[5] and other secular callings[6] is increasingly visible and prominent.

As the contacts between church and state have increased, so has litigation—often involving constitutional issues—raising serious questions about the proper relationship between government and religious organizations.[7] In the wake of this

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1. Increased contacts between church and state may be attributable to two major social changes that have occurred since the Constitution was written—increased religious diversity and increased involvement of organized church groups with business and society. *See* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 365–69 (1984).

2. Changes in such diverse legislation as the Internal Revenue Code (through the Tax Reform Act of 1969), the 1972 amendment to the Civil Rights Act of 1964, and the Employment Retirement Income Security Act have acted to subject formerly exempted church activities to government regulation. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1231 (1980).

> [D]uring the last ten years, American Church leaders have become increasingly concerned about governmental definitions and regulations of churches and religious activities. A small but growing number of religious leaders of all faiths fear that the golden age of religious exemptions has ended. They believe that we are already in the twilight of substantially increased governmental regulation.

Id. at 1231 (quoting Whelan, *Government and the Church*, 139 AMERICA, Dec. 16, 1978, at 450). For a detailed study of the regulations' impact on religiously affiliated higher education, see E. GAFFNEY & P. MOOTS, GOVERNMENT AND CAMPUS: FEDERAL REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION (1982).

3. Esbeck, *supra* note 1, at 367–68.

4. For a detailed examination of the involvement of the Catholic clergy in the American political system, see BETWEEN GOD AND CAESAR (M. Kolbenschlag ed. 1985).

5. *See* A. BALK, THE RELIGION BUSINESS 7–12 (1968).

6. *See* J. HADDEN & C. SWANN, PRIME TIME PREACHERS 1–18 (1981); P. HORSFIELD, RELIGIOUS TELEVISION 8–10 (1984).

7. The following areas of government intervention were enumerated by William P. Thompson, Chairperson of the 1982 Conference on the Religion Clauses sponsored by the National Council of the Churches of Christ in the U.S.A.: (1) Efforts to regulate fundraising solicitations by religious bodies; (2) Efforts to require religious groups to register with and report to government officials if they engage in any efforts to influence legislation (so-called "lobbying disclosure" laws); (3) Efforts by the NLRB to supervise elections by lay teachers in Roman Catholic parochial schools for labor

litigation, an intriguing and potentially far-reaching constitutional theory has developed. This theory suggests that government regulations affecting the activities of religious organizations violate the constitutional provisions most often associated with the prohibition of government aid to those organizations—the establishment clause.[8]

The Supreme Court has yet to utilize the establishment clause to strike down legislative enactments that regulate the activities of religious institutions.[9] Nevertheless, a strong possibility exists that the Court may apply the clause in this manner. Both the Court's dicta[10] and its formulation of the establishment inquiry[11] suggest that the establishment clause may indeed be interpreted as insulating institutional religion from state regulatory efforts. Because the Court has thus far not definitively ruled on this issue, it remains something of a constitutional loose end. Not surprisingly, the lack of resolution has caused a great deal of confusion among the lower courts about the application of the establishment clause to regulatory issues.[12]

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representation (which have since been halted by the U.S. Supreme Court); (4) Efforts by the Internal Revenue Service to separate church-related colleges and hospitals from the churches that sponsor them, for tax purposes, through the definition of "integrated auxiliaries"; (5) Attempts by state education departments to regulate curriculum content and teachers' qualifications in Christian schools (since halted by state courts in Ohio, Vermont, and Kentucky); (6) Attempts by federal and state departments of labor to collect unemployment compensation taxes from church-related agencies that hitherto were exempt, as churches are; (7) Requirements imposed by the former Department of Health, Education and Welfare for coeducational sports, hygiene instruction, and dormitory and off-campus residence facilities at church-related colleges (such as Brigham Young University) which had religious objections to mingling of the sexes in such ways; (8) Efforts by several federal agencies (Civil Rights Commission, Equal Employment Opportunities Commission, Department of Health and Human Services, and Department of Education) to require church-related agencies and institutions, including theological seminaries, to report their employment and admissions statistics by race, sex, and religion, even though they received no government funds, with threats to cut off funds to students attending such schools unless they hired faculty from other religious faiths or complied with other requirements; (9) Sampling surveys of churches and church agencies, conducted by the Bureau of the Census, requiring them to submit voluminous reports, even though the Bureau admitted that it had no authority to do so; (10) Grand jury interrogations of church workers about internal affairs of churches; (11) Clergy used as informants by intelligence agencies; (12) Subpoenas of ecclesiastical records by plaintiffs and defendants in civil and criminal suits; (13) Placing a church in receivership based on dissident members' allegations of financial mismanagement; (14) Orders granted by courts of conservatorship to parents to obtain physical custody of adult children from unpopular religious movements for purposes of forcing them to abandon their adherence thereto; (15) Withdrawal of tax exemption from various religious groups for failure to comply with public policy; (16) IRS definition of "religious ministry" which establishes qualifications to exclude cash housing allowance from taxable income (often contradicting the religious body's own definition of "ministry"); and (17) Redefinition by the courts of ecclesiastical polity, so that hierarchical bodies are in effect determined to be congregational in polity, and dispersed "connectional" bodies are deemed to be hierarchical. Thompson, *Opening Statement of the Chairperson*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 17–18 (D. Kelley ed. 1982).

8. U.S. CONST. amend. I, cl. 1. *See* Esbeck, *supra* note 1, at 247–48; *see also* Note, *Government Non-Involvement with Religious Institutions*, 59 TEX. L. REV. 921 (1981).

9. In Larson v. Valente, 456 U.S. 228 (1982), however, the Court did invalidate a charitable solicitation law that preferred one religion over another. *Id.* at 253–54.

10. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501–04 (1979).

11. The classic foundation of the establishment inquiry test was set down in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). *See infra* text accompanying note 27.

12. If recitation by lower courts proves the value of a legal rule, then the entanglement test, as enunciated in *Lemon*, is priceless. The test has become almost like holy writ: ceremoniously invoked and fervently quoted, but seldom criticized. Nearly every court which has considered cases even remotely related to potential entanglement has quoted the *Lemon* test verbatim. While the lower courts have had little difficulty in quoting the *Lemon* test consistently, they have had increasingly more difficulty in *explaining* and *applying* it consistently to particular fact situations. Even more fundamental, the lower court opinions evidence an uncertainty as to *when* to use the entanglement test.

Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW & CONTEMP. PROBS. 143, 146–47 (Spring 1981) (emphasis in original).

Undoubtedly, the intuitive response of many people to the proposition that the establishment clause protects religious organizations from government regulation would be one of surprise. The free exercise clause traditionally has been the constitutional provision under which alleged government infringement upon religious liberty has been examined.[13] Thus, it might be argued that the establishment theory is no more than a new name for an old theory.[14]

However, review of what may be termed the "regulatory establishment" claim indicates that it is far more than a simple claim for free exercise protection. At a pragmatic level, the establishment claim seeks a substantial departure from the results that would occur under free exercise analysis. At its essence, it advocates that a greater range of activities of religious institutions be protected than occurs under free exercise principles,[15] and that the protection accorded those activities be more comprehensive.[16]

On a theoretical level, this regulatory establishment argument also presents a change, at least in emphasis, and possibly in orientation, of the central meaning of establishment. The dominant understanding of establishment has been political and individualistic. According to this theory, the establishment guarantee is designed to protect individual liberty by assuring government freedom from religious influence.[17] The theory that the establishment clause protects religious institutions from regulatory programs, on the other hand, is theological and institutional. Its theological concern is protecting religion from the corrupting influence of government.[18] Its focus for this purpose is institutional—protecting so-called "corporate" religion rather than individual exercise.[19]

In this Article, we address the contention that the establishment clause should be appropriately viewed as a means to protect religious institutions from state regulatory efforts. Part I traces the development and application of the regulatory establishment claim in the case law. Part II examines the theoretical propositions that support the use of the establishment clause by religious institutions as a protection against governmental interference. Part III presents the pragmatic and theoretical arguments opposed to this position. Finally, Part IV presents the conclusion that, except in limited circumstances, the establishment clause is not an appropriate vehicle to measure the constitutionality of governmental efforts to regulate the activity of religious institutions, and the legality of those measures should be judged solely by reference to other constitutional provisions, most notably the free speech and free exercise clauses.

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13. *See* Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

14. *But see* State v. Corpus Christi People's Baptist Church, 683 S.W.2d 692, 694–95 (Tex. 1985) (stating that the licensing requirement at issue did not offend the establishment clause, but that "a more appropriate and direct means" of questioning the constitutionality of the regulation would be through the free exercise clause).

15. *See infra* notes 279–80 and accompanying text.

16. *See infra* note 136 and accompanying text.

17. *See infra* note 137 and accompanying text.

18. *See infra* note 138 and accompanying text.

19. Corporate, as opposed to individual, religion means "group belief, worship, and morality" and the imposition of a religious discipline upon members of the group. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 90 (1983).

I. THE ESTABLISHMENT CLAUSE AS PROTECTION FOR RELIGIOUS INSTITUTIONS FROM GOVERNMENTAL INTERFERENCE—THE CURRENT DOCTRINAL CHAOS

A. *Precedential Underpinnings—The Decisions of the Supreme Court*

The first suggestion that the Supreme Court might invoke the establishment clause to protect religious institutions from governmental interference arose in the case in which the Court set the framework for its modern establishment understanding. In *Everson v. Board of Education*,[20] the Court considered the constitutionality of a New Jersey statute that provided bus transportation to students attending parochial schools. Despite the Court's invoking the classic Jeffersonian metaphor of "a wall of separation between church and state"[21] and buttressing its remarks with the proposition that no tax, great or small, should be levied by the state in support of religion,[22] the Court nonetheless upheld the program.[23] The Court's rationale for upholding the program is significant. The Court realized that denial of bus transportation benefits to religious schools, when those benefits were freely available to the general public, would itself raise constitutional concerns.[24] According to the Court, the establishment clause requires that government neither advance nor inhibit religion.[25]

The language in *Everson* which suggests that the establishment clause prohibits the inhibition of religion has been continually repeated since the *Everson* decision. Currently, it is enshrined in the second prong of the famous three-part test of *Lemon v. Kurtzman*, which is applied throughout the Court's establishment jurisprudence.[26] This test requires that the statute have a secular purpose, that its principal or primary effect be one that neither advances nor inhibits religion, and that the statute not foster "an excessive government entanglement with religion."[27]

Obviously, the "inhibits" language, if literally interpreted, could serve to protect religious institutions from state regulation. However, since the Court has yet to strike down an enactment pursuant to the "inhibits" language, the meaning of that language remains unclear. For this reason, the fact that the Court's first admonition against inhibiting religion occurred in the context of its upholding an aid statute may be significant. There is, after all, a great difference between using a principle as a rationale to uphold an aid statute and using it to invalidate a government regulation. It is arguable that the "inhibits" language may apply only when religion or religious adherents are deprived of benefits available to all other segments of the community.

Equally perplexing is the application of the third prong of the *Lemon* test—entanglement—to government regulation. As with the prohibition against inhibiting religion, the prohibition against entangling church and state could easily be applied

20. 330 U.S. 1 (1947).
21. *Id.* at 16.
22. *Id.*
23. *Id.* at 18.
24. *Id.* at 16–17.
25. Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).
26. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).
27. *Id.* at 612–13.

to regulatory requirements. Yet, as with the "inhibits" language, the genesis of the nonentanglement requirement in *Walz v. Tax Commission of New York* was as a rationale for upholding an aid provision.[28] *Walz* concerned the constitutionality of property tax exemptions for religious institutions.[29] In upholding the tax exemptions, the Court relied heavily on the proposition that one purpose and effect of tax exemption was to ensure that there would not be "an excessive government entanglement with religion,"[30] as might occur through the use of tax liens or foreclosures to enforce a church's tax obligations.[31] One year later, the Court in *Lemon* entrenched the prohibition against excessive government entanglement with religion in the third prong of the Court's establishment test, and used it to invalidate a parochial aid program.[32]

As with "inhibits," the meaning of the term "excessive entanglement" has not been clarified. One commentator, for example, has argued that the principle does no more than license subjectivity on the part of those who apply the standards.[33] Yet one matter is clear: the entanglement test has never been used to strike down a regulatory requirement. On two occasions, however, the Supreme Court has suggested that it might apply the entanglement test to protect religious organizations from government regulation.[34] These cases merit attention here.

In *NLRB v. Catholic Bishop of Chicago*,[35] the Court confronted the NLRB's asserted jurisdiction over two sets of high schools operated by the Catholic church. In both instances, lay faculty of the high schools had voted for representation by an employee association and had sought to bargain with their respective employers.[36] The Seventh Circuit had refused to enforce the NLRB's bargaining order on the ground that it would violate the religion clauses of the first amendment.[37]

The Supreme Court affirmed in a curious opinion that discussed but did not decide the constitutional issues.[38] The Court analyzed whether first amendment issues would be implicated by the assertion of NLRB jurisdiction. Having concluded that they would, the Court determined that constitutional implications required a finding of a clearly expressed Congressional intention that the NLRB possess that jurisdiction.[39] Finding no such express intention, the Court concluded that the NLRB could not exercise jurisdiction over the teachers.[40]

The Court identified three specific constitutional issues[41] and briefly discussed

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28. 397 U.S. 664 (1970).
29. *Id.* at 666.
30. *Id.* at 674.
31. *Id.*
32. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).
33. Ripple, *supra* note 2, at 1216–18.
34. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501–07 (1979) (entire analysis centers on the entanglement issue); Tony and Susan Alamo Found. v. Secretary of Labor, 105 S. Ct. 1953, 1964 (1985) (perfunctory treatment of the inhibition issue).
35. 440 U.S. 490 (1979).
36. *Id.* at 493.
37. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977).
38. 440 U.S. 490, 506–07 (1979).
39. *Id.* at 504.
40. *Id.* at 506.
41. *See id.* at 499–507.

problems that would be posed by each one were it before the Court.[42] Because this case has been relied upon by lower courts in resolving similar church regulation cases, a review of the Court's dicta is required.

First, the Court indicated that because of the "unique role of the teacher in fulfilling the mission of a church-operated school,"[43] improper entanglement between church and state was more likely than in other areas. The Court stopped short, however, of deciding that mandatory collective bargaining involving faculty at religious schools would create this excessive entanglement, stating only that some entanglement could not be avoided by the assumption of NLRB jurisdiction.[44] "[W]e are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue."[45]

The Court also considered, but did not decide, a second closely related issue—whether an NLRB investigation of an unfair labor practice charge would entangle the Board in the religious polity's theological determinations when the religious organization asserted that the contested practice was motivated by religious principle.[46] Regarding this issue, the Court merely repeated the Seventh Circuit's observation that inquiry into religious principle would be necessary.[47] Such an inquiry into religious beliefs would, according to the Court, present "a significant risk that the First Amendment would be infringed."[48]

Third, the Court considered, but again did not determine, whether NLRB determinations of the proper subjects for bargaining would result in unconstitutional conflicts between the Board and clergy-administrators.[49] The Court did not offer specific examples of conflicts that might arise, nor did it suggest why any conflict would be impermissible. The Court merely noted that since topics for collective bargaining arguably included everything that occurred in the parochial schools, such a determination would "[i]nevitably . . . implicate sensitive issues that open the door" to conflicts between the clergy and the Board or the union.[50]

In sum, if the Court intended to say that establishment clause theory would be applied in future church regulation cases, it failed expressly to do so. On the other hand, it is clear that the Court meant to convey that governmental intrusion upon a religious organization raises constitutional concerns involving both the establishment

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42. *Id.*

43. *Id.* at 501 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittenger, 421 U.S. 349 (1975); and Wolman v. Walter, 433 U.S. 229 (1977) as authority for the proposition).

44. 440 U.S. 490, 502 (1979).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* The factual premise of this statement is questionable. The Court apparently accepted the bishops' argument that whenever a faculty employee is discharged under circumstances suggesting antiunion motivation, the NLRB not only questions whether the religious principle offered as justification is merely pretextual, but also seeks to show pretext by inquiring whether the principle is part of the school's religion at all. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1125 (7th Cir. 1977). Logically, however, the NLRB need not show that a religious principle is a sham to establish that the principle did not motivate the discharge. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (holding that action complained of was not motivated by the reasoning offered because others had engaged in similar misconduct without discipline).

49. 440 U.S. 490, 504 (1979).

50. *Id.* at 503.

and free exercise clauses.[51] At least, the *Catholic Bishop* opinion suggested that a legislative decision to exempt religious institutions would be well founded. However, because the Court did not reach the constitutional issues, the question is open as to whether the actual regulatory practice in *Catholic Bishop* implicates establishment, free exercise, or any constitutional interest at all.

The Court next examined whether the establishment clause shields religious organizations from government regulations in *Tony and Susan Alamo Foundation v. Secretary of Labor*.[52] The Foundation, a nonprofit religious organization, had as its primary purpose the establishment and maintenance of an evangelistic church.[53] The Foundation also operated at least thirty commercial businesses—including service stations, restaurants, retail clothing and grocery outlets, roofing and electrical construction companies, and hog farms.[54] These businesses were staffed in part by three hundred of the Foundation's associates (described by the courts as rehabilitated derelicts, drug addicts, and criminals), who considered themselves to be volunteers, and who neither expected nor desired monetary compensation for their work.[55] The associates received food, clothing, shelter, transportation, and medical benefits from the Foundation, and tended to be entirely dependent upon these benefits for long periods of time.[56]

The Secretary of Labor filed suit against the Foundation in 1977, seeking injunctive relief for violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act (FLSA).[57] The Foundation sought dismissal, relying on both statutory and constitutional defenses. As a statutory matter, the Foundation argued that it was outside the statutory boundaries because it was not an "enterprise" under the Act, nor were its associates "employees."[58] On a constitutional level, the Foundation argued that if it were subject to the provisions of the Act, its free exercise rights and the establishment proscription against excessive entanglement would be violated.[59]

The district court held for the government on all issues.[60] Since the Foundation was engaged in various commercial activities that served the general public and competed with other entrepreneurs, the court defined it as an enterprise under the Act.[61] The court further held that the benefits received by the associates were "simply wages in another form," and thus, the associates were employees within the

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51. The Supreme Court adopted the Seventh Circuit's characterization of the constitutional issues as invoking the combined Religion Clauses rather than differentiating between the dual aspects of establishment and free exercise of religion. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977).

52. 105 S. Ct. 1953 (1985), *aff'g* Donovan v. Tony and Susan Alamo Found., 722 F.2d 397 (8th Cir. 1983), *aff'g in part* 567 F. Supp. 556 (W.D. Ark. 1982).

53. *Id.* at 1957.

54. *Id.*

55. *Id.* at 1957–58.

56. *Id.*

57. *Id.* at 1957. *See* Donovan v. Tony and Susan Alamo Found., 567 F. Supp. 556 (W.D. Ark. 1982).

58. 567 F. Supp. 556, 573–75 (W.D. Ark. 1982).

59. *Id.* at 574.

60. *Id.* at 573–75.

61. *Id.* at 573.

meaning of the Act.[62] Finally, reaching the constitutional issues, the court held that applying the FLSA to the Foundation's associates did not violate the religious guarantees of the first amendment.[63]

On appeal, the issue of whether the application of the FLSA to the Foundation's associates violated the establishment clause was considered in some detail by the Eighth Circuit. Applying the three-part *Lemon* test, that court found that the FLSA had a clear secular purpose, namely the protection of the health and economic welfare of workers.[64] The court also found no difficulty with the primary effect of the legislation prong of the *Lemon* test, since the legislation neither advanced nor inhibited religious concerns.[65]

However, the issue of excessive entanglement between church and state, and the *Catholic Bishop* precedent posed a substantial problem for the appellate court.[66] The court distinguished *Catholic Bishop* on two grounds. First, the court stated that the entanglement problems raised by the enforcement of minimum wage and hour provisions against church-operated charities or commercial businesses were substantially less than those raised by the continuous and ongoing supervision of teachers in a church school, since the former involves neither "the critical and unique role of the teacher," nor "the danger of government involvement in day-to-day administration and monitoring."[67] Second, the court observed that the mechanisms utilized by the National Labor Relations Act, namely collective bargaining and elections, were inherently confrontational and adversarial in nature, whereas the FLSA "effects its objectives by the dull and detailed financial technique peculiar to accountants."[68] On this basis, the Eighth Circuit concluded that no violation of the establishment clause had been presented.[69]

The Supreme Court dismissed the establishment clause challenge briefly, implying that a regulatory enactment could pose establishment clause concerns nevertheless. The Court stated that the FLSA had a legitimate secular purpose and that the "routine and factual inquiries" required by the Act "bear no resemblance to the kind of government surveillance . . . previously held to pose an intolerable risk of government entanglement with religion" and were no more intrusive than fire inspections or building and zoning regulations, none of which exempt religious organizations.[70] Thus, as with *Catholic Bishop*, the possibility that the establishment clause could be used to strike down governmental regulation of corporate religious activity remained.

The preceeding account of the regulatory establishment issue would not be complete without at least a brief mention of *Ohio Civil Rights Commission v. Dayton*

62. *Id.* at 574.
63. *Id.*
64. Donovan v. Tony and Susan Alamo Found., 722 F.2d 397, 401–02 (8th Cir. 1983).
65. *Id.* at 402.
66. *Id.*
67. *Id.*
68. *Id.* at 402–03.
69. *Id.* at 403.
70. Tony and Susan Alamo Found. v. Secretary of Labor, 105 S. Ct. 1953, 1964 (1985).

Christian Schools,[71] a case most notable for its avoidance of the substantive issue. The matters leading up to the *Dayton Christian Schools* decision began when a religious employer, the Dayton Christian Schools (DCS), informed one of its teachers that her contract would not be renewed for the upcoming year because she was pregnant and DCS policy was that mothers should stay at home with pre-school age children. When the teacher consulted an attorney regarding this matter, rather than proceeding internally, she was terminated by DCS on the grounds that her seeking outside counsel violated the "biblical chain of command," a doctrine ascribed to by DCS which posits that "one Christian should not take another Christian into the courts of the State."[72]

Following her termination, the teacher filed a charge of sex discrimination with the Ohio Civil Rights Commission (Commission). The Commission instituted a preliminary investigation which resulted in a finding of probable cause to believe that DCS had engaged in unlawful discrimination and had illegally retaliated against the teacher.[73] The Commission also indicated that its jurisdiction was not ousted on the grounds that DCS was a religious institution.[74] After unsuccessfully urging conciliation, the Commission filed a formal complaint against DCS. DCS answered by asserting that the Commission lacked jurisdiction because of the religious basis for the discharge.[75]

While these proceedings were pending, DCS sued in federal court seeking a permanent injunction against the Commission on the grounds that "any investigation of [DCS] hiring process or any imposition of sanctions . . . would violate the Religion Clauses of the First Amendment."[76] The district court dismissed the complaint,[77] but the Sixth Circuit reversed, holding that the Commission's exercise of jurisdiction was contrary to both the free exercise and establishment clauses.[78] The establishment holding of the Sixth Circuit was an express approval of the regulatory establishment position. Using an entanglement analysis, the court held that the exercise of jurisdiction over DCS raised three difficulties. First, it involved regulation over an institution that was pervasively religious.[79] Second, it would immerse the state in inquiries regarding the religious bases of personnel decisions affecting teachers, termed by the Circuit Court as the "ideological resources of the school."[80] Third, it would create an ongoing, rather than a one-time, church-state encounter.[81] On this basis the circuit court concluded that the Commission's proceeding against DCS violated the establishment clause.

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71. 106 S. Ct. 2718 (1986).
72. *Id.* at 2721.
73. *Id.* at 2721.
74. Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932, 935 (6th Cir. 1985).
75. *Id.*
76. 106 S. Ct. 2718, 2722 (1986).
77. Dayton Christian Schools v. Ohio Civil Rights Comm'n, 578 F. Supp. 1004 (S.D. Ohio 1984).
78. Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985).
79. *Id.* at 957.
80. *Id.* at 958.
81. *Id.* at 958-959.

The United States Supreme Court reversed, primarily on procedural grounds.[82] Relying on the principles announced in *Younger v. Harris*,[83] the Court held that the federal court should defer to the ongoing state proceedings, since those proceedings vindicated "important state interests"[84] and since the school would have a "full and fair opportunity to litigate [its] constitutional claim."[85] The Court briefly touched upon the religion clause issues by rejecting the school's argument that "the mere exercise of jurisdiction over it by the state violates its first amendment rights."[86] But even here the Court's first response was procedural: "[W]e have repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.'"[87] The Court went on to address the regulatory establishment claim in an extraordinarily brusque fashion. Dismissing DCS' argument, the Court wrote, "Even religious schools cannot claim to be wholly free from some state regulation . . . .[T]he Commission violates no constitutional rights by merely investigating the circumstances of [the teacher's] discharge in this case . . . ."[88] To the extent these statements are not mere dicta, they suggest a strong repudiation of both the DCS' and the Sixth Circuit's regulatory establishment analysis. The only certainty, however, is that because of its oblique reference to the issue, *Dayton Christian Schools* will likely add to the confusion surrounding the regulatory establishment claim.

B. *Doctrinal Confusion in the Lower Courts*

Regulatory establishment challenges to government regulations have been considered in a variety of contexts by the lower courts. These include challenges by parochial schools to compulsory education,[89] teacher certification and curriculum requirements;[90] attacks on compulsory process issued by the IRS and other government agencies;[91] and objections to various local ordinances relating to zoning,[92] solicitation,[93] and licensing[94] as applied to religious organizations. Labor law particularly has generated much litigation, with employment discrimination regulation occupying much of the battleground.[95] However, both *Alamo* and *Catholic Bishop* demonstrate that the regulatory establishment issue exists in other labor law contexts and, in that respect, it is notable that neither case conclusively settled the constitutionality of their

82. All nine Justices avoided direct review of the substantive issues. The five-person majority required dismissal on the equitable restraint principles announced in *Younger v. Harris*, 401 U.S. 37 (1971). Four concurring Justices argued that the case should be dismissed on ripeness grounds.

83. 401 U.S. 37 (1971).

84. 106 S. Ct. 2718, 2722 (1986). The Court extended the *Younger* doctrine from state criminal proceedings to state civil proceedings vindicating important state interests in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

85. *Id.* at 2723.

86. *Id.* at 2724.

87. *Id.*

88. *Id.*

89. *See infra* notes 122–29 and accompanying text.

90. *See infra* notes 117–21 and accompanying text.

91. *See infra* notes 111–16 and accompanying text.

92. *See infra* note 132 and accompanying text.

93. *See infra* note 131 and accompanying text.

94. *See infra* note 130 and accompanying text.

95. *See infra* notes 104–10 and accompanying text.

respective statutes' application to religious organizations. The constitutionality of the FLSA as applied to church-controlled schools remains in doubt even after *Alamo*,[96] and a number of courts, distinguishing *Catholic Bishop*, have approved the exercise of NLRB jurisdiction over a variety of religious institutions.[97]

Review of the lower court decisions reflects serious doctrinal confusion, as well as outright disagreement, over fundamental principles. Indeed, the courts fail to agree on how to frame the regulatory establishment principle. Some religious organizations have phrased their objections to reporting requirements in terms of entanglement;[98] others have claimed religious harassment[99] or relied on general first amendment grounds.[100] Compulsory process has been characterized as an entanglement violation,[101] or, occasionally, as a violation of associational rights.[102] Certification[103] and licensing[104] requirements also have been challenged on these grounds and on the basis that the state lacks the authority to promulgate such regulations.[105]

The results in the cases, as one might expect, are equally inconsistent. In the area of employment discrimination, for example, one court has held that the application of Title VII to religious employers violates the establishment clause,[106] while others have held that such an application creates no constitutional difficulties.[107] Some courts, noting Title VII's explicit exemption for religious-based discrimination, have ap-

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96. *See* Donovan v. Central Baptist Church, 96 F.R.D. 4 (S.D. Tex. 1982); Turner v. Unitarian Church, 473 F. Supp. 367 (D.R.I. 1978).

97. *See* Volunteers of America-Minnesota—Bar None Boys Ranch v. NLRB, 752 F.2d 345 (8th Cir. 1985) (residential treatment center for children); Volunteers of America, Los Angeles v. NLRB, 777 F.2d 1386 (9th Cir. 1985) (church alcohol service division); Universidad Central de Bayamon v. NLRB, 778 F.2d 906 (1st Cir. 1985) (university) (case withdrawn from publication); NLRB v. Salvation Army, 763 F.2d 1 (1st Cir. 1985) (day care center); St. Elizabeth Community Hosp. v. NLRB, 708 F.2d 1436 (9th Cir. 1983) (religious hospital). *See also* Catholic High School Ass'n of the Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d. Cir. 1985) (upholding jurisdiction of state labor relations board over parochial school).

98. *See, e.g.*, Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979); Attorney Gen. v. Bailey, 386 Mass. 367, 436 N.E.2d 139 (1982).

99. *See* SEC v. Knopfler, 658 F.2d 25 (2d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

100. *See, e.g.*, Taylor v. Knoxville, 566 F. Supp. 925 (E.D. Tenn. 1982); Donovan v. Central Baptist Church, 96 F.R.D. 4 (S.D. Tex. 1982).

101. *See, e.g.*, Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1439 (1984); United States v. Coates, 692 F.2d 629 (9th Cir. 1982); United States v. Grayson County State Bank, 656 F.2d 1070 (5th Cir. 1981); United States v. Holmes, 614 F.2d 985 (5th Cir. 1980); Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979).

102. *See, e.g.*, United States v. Church of World Peace, 775 F.2d 265 (10th Cir. 1985); United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979); Middleton v. United States, 609 F. Supp. 1045 (N.D. Ohio 1985); Gothic Evangelical Church v. United States, 600 F. Supp. 358 (D. Minn. 1984).

103. *See, e.g.*, Johnson v. Charles City Community Schools Bd. of Educ., 368 N.W.2d 74 (Iowa 1985); Sheridan Rd. Baptist Church v. Department of Educ., 132 Mich. App. 1, 348 N.W.2d 263 (1984); New Jersey State Bd. of Educ. v. Shelton College, 90 N.J. 470, 448 A.2d 988 (1982).

104. *See, e.g.*, Congregation Beth Yitzchok of Rockland v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984); State v. Corpus Christi People's Baptist Church, 683 S.W.2d 292 (Tex. 1984).

105. *See* Sheridan Rd. Baptist Church v. Department of Educ., 132 Mich. App. 1, 348 N.W.2d 263 (1984).

106. *See* Rayburn v. General Conf. of Seventh Day Adventists, 772 F.2d 1164, 1171–72 (4th Cir. 1985); *see also* Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), *rev'd*, 106 S. Ct. 2718 (1986). Another court would hold such an application of Title VII unconstitutional only as applied to ministerial/pastoral employees of the church. *See* EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981).

107. EEOC v. Pacific Press Publ'g Ass'n., 676 F.2d 1272 (9th Cir. 1982); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980); EEOC v. Fremont Christian School, 609 F. Supp. 344 (N.D. Cal. 1984); Amos v. Corporation of Presiding Bishop, 594 F. Supp. 791 (D. Utah 1984); Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983); Russell v. Belmont College, 554 F. Supp. 667 (M.D. Tenn. 1982); Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980); Hazen v. Catholic Credit Union, 37 Wash. App. 502, 681 P.2d 856 (1984).

proved the right of religious employers to discriminate on religious grounds.[108] Others have addressed the issue whether this exemption may itself raise establishment clause problems,[109] and several cases have held that the exemption violates the establishment clause when applied to employees performing secular, nonreligious activities.[110] Courts also disagree as to the proper course to follow when it is unclear whether the alleged discrimination was religiously motivated. Some courts hold that the church may raise either the free exercise or establishment clause as an affirmative defense to an EEOC proceeding,[111] while others find that the arguable presence of religious motive is sufficient to preclude EEOC jurisdiction over the dispute.[112]

In the context of religious organizations' objections to summons presented by the IRS for the purpose of determining the tax exempt status of a church, the results are slightly more consistent, but doctrinal confusion remains. Most courts agree that so long as the summons requires the church to produce only the documentation necessary to a determination of its tax liability, no first amendment objection will be permitted.[113] Other courts have extended their approval to summons that were limited to relevant materials.[114] Summons seeking the membership lists of churches, all correspondence files during a given time period, and minutes of directors'/officers' meetings, on the other hand, generally have been invalidated.[115] Yet, courts reaching similar results have done so on a variety of dissimilar grounds, some appearing to use entanglement notions to support a free exercise conclusion,[116] others resting on undifferentiated first amendment grounds,[117] and still others relying on the church's associational rights.[118]

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108. *See* Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983); Ritter v. Mount St. Mary's College, 495 F. Supp. 724 (D. Md. 1980).

109. *See* Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983); Hazen v. Catholic Credit Union, 37 Wash. App. 502, 681 P.2d 856 (1984).

110. *See* Amos v. Corporation of Presiding Bishop, 594 F. Supp. 791 (D. Utah 1984). *See also* Isaac v. Butler's Shoe Corp., 511 F. Supp. 108, 112 (N.D. Ga. 1980) (holding that the accommodation provision of the Civil Rights Act violates the establishment clause); Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782, 784–91 (S.D. Cal. 1980) (same); Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (same). However, other courts have held that the accommodation provisions of Title VII are constitutional. Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1246 (9th Cir. 1981); Nottelson v. A.O. Smith Corp., 643 F.2d 445, 453–55 (7th Cir. 1981); McDaniel v. Essex Int'l, 509 F. Supp. 1055 (W.D. Mich. 1981).

111. *See* Ritter v. Mount St. Mary's College, 495 F. Supp. 724 (D. Md. 1980).

112. *See* Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), rev'd, 106 S. Ct. 2718 (1986); Rayburn v. General Conf. of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981); Madsen v. Erwin, 395 Mass. 715, 481 N.E.2d 1160 (Mass. 1985).

113. *See* United States v. Church of World Peace, 775 F.2d 265 (10th Cir. 1985); United States v. Coates, 692 F.2d 629 (9th Cir. 1982); United States v. Holmes, 614 F.2d 985 (5th Cir. 1980); United States v. Life Science Church of Am., 363 F.2d 221 (8th Cir. 1980).

114. *See* United States v. Grayson County State Bank, 656 F.2d 1070 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982); United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979).

115. *See* United States v. Holmes, 614 F.2d 985 (5th Cir. 1980); United States v. Life Science Church of Am., 636 F.2d 221 (8th Cir. 1980).

116. *See, e.g.*, United States v. Grayson County State Bank, 656 F.2d 1070 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

117. *See, e.g.*, United States v. Church of World Peace, 775 F.2d 265 (10th Cir. 1985); United States v. Life Science Church of Am., 636 F.2d 221 (8th Cir. 1980); Assembly of Yahveh Beth Israel v. United States, 592 F. Supp. 1257 (Colo. 1984).

118. *See, e.g.*, United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979); Middleton v. United States, 609 F. Supp. 1047 (N.D. Ohio 1985); Gothic Evangelical Church v. United States, 600 F. Supp. 359 (D. Minn. 1984).

The fate of teacher certification, curriculum, and licensing requirements as applied to parochial schools generally has been favorable, with most courts rejecting challenges based on free exercise,[119] establishment,[120] and authority[121] grounds. However, there are exceptions to this general trend. One court invalidated state curriculum standards as a violation of free exercise principles,[122] and another court struck down teacher certification, accreditation, and textbook approval requirements as applied to church schools based on a unique provision in its state constitution, which gave parents the right to remove their children from any school to which they conscientiously objected.[123]

The constitutionality of compulsory attendance requirements as applied to parochial schools and parents who wish to teach their children at home for religious reasons is similarly unresolved. Some courts have upheld state compulsory education laws over challenges based on the free exercise clause,[124] the establishment clause,[125] associational rights,[126] and the argument that the state lacks authority to promulgate compulsory education laws.[127] Other courts have placed the burden of showing least restrictive means and the absence of excessive entanglement on the state,[128] and one court has declared compulsory attendance requirements unconstitutional as applied to a non-Amish parent whose child was being taught in an Amish school by an uncertified teacher.[129] This court concluded that, since the minimum standards of the state were broader than necessary to assure the state's legitimate interest in the child's education, the application of those minimum standards to the parents infringed their free exercise rights.[130] It appears that, at the very least, a parent challenging a compulsory education requirement on free exercise grounds must show that public education, certified teachers, or state-required courses would substantially interfere with their religious beliefs.[131] It is unclear precisely what constitutes excessive entanglement in this context, but one court has held that requiring the supervisory officers of a church school to disclose the name, age, and residence of each child

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119. *See, e.g.*, North Dakota v. Rivinius, 328 N.W.2d 220 (N.D. 1982); Jernigan v. State, 412 So. 2d 1242 (Ala. App. 1982); State *ex rel.* McLemore v. Clarksville School of Theology, 636 S.W. 2d 706 (Tenn. 1982).

120. *See, e.g.*, Windsor Park Baptist Church v. Arkansas Activities Ass'n, 658 F.2d 618 (8th Cir. 1981); Sheridan Road Baptist Church v. Department of Educ., 132 Mich. App. 1, 348 N.W.2d 263 (1984); New Jersey Bd. of Educ. v. Shelton College, 90 N.J. 470, 448 A.2d 988 (1982).

121. *See, e.g.*, Sheridan Rd. Baptist Church v. Department of Educ., 132 Mich. App. 1, 348 N.W.2d 263 (1984).

122. *See* State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

123. *See* Kentucky State Bd. for Elem. & Second. Educ. v. Rudasill, 589 S.W.2d 877, 882–83 (Ky. 1979).

124. *See, e.g.*, Jernigan v. State, 412 So. 2d 1242 (Ala. Crim. App. 1982); State v. Shaver, 294 N.W.2d 883 (N.D. 1980); Meyerkorth v. State, 173 Neb. 889, 115 N.W.2d 585 (1962), *appeal dismissed*, 372 U.S. 705 (1963). *See also* State *ex rel.* Kandt v. North Platte Baptist Church, 216 Neb. 684, 345 N.W.2d 19 (1984).

125. *See, e.g.*, Attorney Gen. v. Bailey, 386 Mass. 367, 436 N.E.2d 139 (1982). *See also* Mazanec v. North Judson-San Pierre School Corp., 763 F.2d 848 (7th Cir. 1985) (holding abstention below improper and remanding for a decision on the merits); Bangor Baptist Church v. Maine, 549 F. Supp. 1208 (D. Me. 1982) (refusing summary judgment on free exercise and establishment issues since state had not shown least restrictive means or absence of entanglement).

126. *See, e.g.*, Attorney Gen. v. Bailey, 386 Mass. 367, 436 N.E.2d 139 (1982).

127. *See, e.g.*, Meyerkorth v. State, 173 Neb. 889, 115 N.W.2d 585 (1962).

128. *See, e.g.*, Bangor Baptist Church v. Maine, 549 F. Supp. 1208 (D. Me. 1982).

129. *See* State *ex rel.* Nagle v. Olin, 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980), (relying on State v. Whisner, 47 Ohio St. 2d 181 (1976)).

130. *Id.* at 355, 415 N.E.2d at 288.

131. *See* Jernigan v. State, 412 So. 2d 1242 (Ala. Crim. App. 1982); State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

attending the school does not entail the "continuing monitoring or potential for regulating the religious activity"[132] ostensibly forbidden by the establishment clause.

The inconsistency among courts within each specific area, however, is only a symptom of the actual problem. Confusion exists because few courts have endeavored to examine whether a regulatory establishment claim presents a proper constitutional concern. Rather, when parties allege establishment claims, the courts tend to apply *Lemon* without asking whether the claim presents a relevant issue. Similarly, in FCC,[133] solicitation,[134] and zoning[135] cases, where the challenged enactments generally have been summarily upheld against establishment attack, courts have failed to analyze whether establishment claims are pertinent or why these areas are apparently less susceptible to constitutional challenge than employment discrimination or parochial school requirements. A theoretical perspective from which the regulatory establishment claim may be evaluated, therefore, is sorely needed.

II. The Establishment Clause As a Barrier to Government Regulation of Religious Institutions

Despite precedent in its favor, the argument that the establishment clause properly may limit governmental regulation of religious institutions faces immediate obstacles. Semantically, it is difficult to reconcile a prohibition on establishment with a prohibition on regulation. Establishment connotes support or endorsement.[136] It is somewhat illogical to maintain that government is supporting a religious institution by forcing it to comply with regulatory requirements.

Substantively, using the establishment clause to protect religious institutions from government regulation, even if suggested by occasional dicta, is also fundamentally incompatible with the Supreme Court's approach to establishment issues. The results consistently reached in establishment cases accord with the clause's semantic connotation—that relevant inquiry is whether the challenged governmental action benefits or endorses religion.[137] Moreover, as will be discussed in a later section,[138] the *Lemon* test,[139] despite language seemingly favorable to the regulatory establishment theory, would have to be altered drastically to accommodate that

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132. Attorney Gen. v. Bailey, 386 Mass. 367, 436 N.E.2d 139 (1982).

133. *See, e.g.*, Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984); King's Garden, Inc. v. FCC, 498 F.2d 51, 60 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974); Brandywine-Main Line Radio v. FCC, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). *See generally* Hardy & Secrest, *Religious Freedom and the Federal Communications Commission*, 16 VAL. U.L. REV. 57 (1981).

134. *See, e.g.*, Taylor v. City of Knoxville, 566 F. Supp. 925 (E.D. Tenn. 1982); Sylte v. Metropolitan Gov't of Nashville, 493 F. Supp. 313 (M.D. Tenn. 1980).

135. *See, e.g.*, Lakewood Congreg. of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983); Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

136. *Cf.* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1382 (1981).

137. *See generally* Marshall, *"We Know It When We See It:" The Supreme Court and Establishment*, 59 USC L. REV. 499 (1986); cf. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); Wallace v. Jaffree, 105 S. Ct. 2479, 2501 (1985) (O'Connor, J., concurring).

138. *See infra* Part III(B).

139. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); *supra* text accompanying note 27.

theory.[140] Without alteration, the protection accorded religious institutions from any regulatory effort would be essentially absolute, regardless of countervailing policy considerations.[141]

Finally, the view that the establishment clause protects religious institutions from government regulation reflects a philosophical and historical understanding of the first amendment not shared by the Court. As Professor Mark DeWolfe Howe has noted, the Court has been guided in its establishment jurisprudence primarily by the political, rationalist views of Thomas Jefferson, who envisioned the first amendment as protecting individual interests by freeing government from the incursion and dominance of religion.[142] The theory supporting the proposition that the establishment clause protects religion from government, on the other hand, is essentially theological, not rationalist, and its architect is Roger Williams,[143] not Jefferson. Its basis, moreover, is not one of protecting political freedom, but rather "a principle of theology" that "a church dependent on governmental favor cannot be true to its better self."[144]

The argument that the establishment clause protects religion from government regulation, then, has no basis in current establishment understanding; it postulates only what that understanding ought to be. The case for its acceptance, however, is fraught with difficulties beyond the simply precedential.

Certainly, the claim that some religious activities are protected presents no controversy. The first amendment requires freedom for the theological activities of churches.[145] Acceptance of this principle, however, does not inexorably lead to church freedom from government regulations under establishment principles, nor does it suggest that all church activities merit constitutional protection. The essential concern of Williams' theory of religious freedom, after all, is that the state not interfere with religious conscience and theology[146]—matters protected without recourse to the establishment clause. Other first amendment provisions, notably the free exercise[147] and free speech clauses,[148] protect religious exercise and ensure that the state does not interfere with theological doctrine and decisions.[149]

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140. *See infra* notes 238–44 and accompanying text.

141. *See infra* notes 238–39 and accompanying text.

142. M. HOWE, THE GARDEN AND THE WILDERNESS (1965).

143. *Id.*

144. *Id.* at 7–8. To some degree, even Williams' theory does not support the broad claim for protection of religious institutions addressed in this Article. At the core of Williams' theory was a concern for the protection of individual religious exercise rather than the protection of so-called "corporate" religion itself. *See* Smith, *supra* note 19, at 113 (citing S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE, ch. 23 (1975)). *See also* J. MURRAY, WE HOLD THESE TRUTHS 49–53 (1960); T. SANDERS, PROTESTANT CONCEPTS OF CHURCH AND STATE 185–91 (1964).

145. Laycock, *supra* note 136, at 1386 nn.108–09 and authorities cited therein.

146. M. Howe, *supra* note 142, at 6; Esbeck, *supra* note 1, at 357–58.

147. U.S. CONST., amend. I, cl. 2, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972).

148. U.S. CONST., amend. I, cl. 3. Widmar v. Vincent, 454 U.S. 263 (1981); Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 558 (1983).

149. Laycock suggests that free exercise analysis may be too rigid since, if taken literally (that is, applied only to matters of doctrine), such obviously religious practices as choir singing and the rosary might be removed from constitutional protection. *See* Laycock, *supra* note 136, at 1390. Free exercise protection appropriately has been applied to religious practices that have no specific bases in dogma. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

Proponents of the regulatory establishment view argue that religious institutions should be protected beyond the limits of current constitutional interpretation and, indeed, beyond the parameters of the theory that purportedly provides the argument with its philosophical base. Claims for constituitional protection of the integrity and inviolability of religious practice and dogma do not appear, at least directly, to relate to claims for the constitutional protection of public fundraising, politics, commercial enterprise, and operation of broadcast media. Nor does a theory concerned with government intrusion into matters of religious doctrine immediately suggest that the tenets of religious organizations would be violated by any proposed contact with government, no matter how innocuous or routine the intrusion.

Nonetheless, forceful arguments have been advanced to the effect that even seemingly innocuous governmental regulation of any activity undertaken by religious entities may be an improper intrusion into theological affairs. Professor Douglas Laycock expresses this idea in his argument that all activities of religious institutions should be protected under a free exercise principle of church autonomy (rather than under any establishment principle): "When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future."[150] For Laycock, the risk attending such interference, and the subsequent necessity for constitutional protection, arises in all church activities, including the "most routine" matters.[151] Professor Carl Esbeck has assumed a similar position, arguing that establishment does protect religious institutions from state regulatory efforts: "If a church or other religious organization is unduly involved with the agencies of government, it may become subverted and redirect its programs to meet ends chosen by government. Accordingly, the church becomes compromised in its efforts to act in accord with its higher calling."[152]

Undoubtedly, there is merit to Laycock's and Esbeck's contention. Regulatory requirements may have an indirect and subtle effect on theological development. As Laycock points out, doctrinal change is fluid and subject to influence by a wide range of factors;[153] thus, it is not difficult to envision how regulatory requirements might affect this process. Whatever might be said in their defense, regulatory programs are often burdensome and the natural inclination of any regulated entity is often to adjust voluntarily the way it operates in order to promote its own ease of compliance. At times, the effect may be totally subconscious, as when a regulated entity pigeonholes an activity into a classification set forth on a reporting form.[154] At other times, the

150. Laycock, *supra* note 136, at 1391. Laycock's theory of church autonomy coincides in result, if not in rationale, with the regulatory establishment model, since he posits that all activities of religious institutions are protected. Since many of Laycock's arguments support the regulatory establishment position, and since his conclusion—that all activities of religious institutions are protected—contrasts the central thesis of this Article, his free exercise position will be addressed along with the claim for regulatory establishment.

151. *Id.* at 1397. Laycock's theory, it must be noted, is not based solely on the protection of doctrinal development but also stems from his broad understanding of what is religion. *See id.* at 1390–91.

152. Esbeck, *supra* note 1, at 374. *See also id.* at 378.

153. Laycock, *supra* note 136, at 1391.

154. *See* Carlson, *Regulators and Religion: Caesar's Revenge*, 3 REGULATION 27, 31 (May/June 1979); Esbeck, *supra* note 1, at 368.

decision may be more conscious, as when a church faces the choice of either characterizing a "pious custom" as theologically-based or risks having the practice subject to regulatory sanction.[155]

Presumably, both Laycock and Esbeck would agree that the purpose behind protecting all activities undertaken by religious institutions is to some extent prophylactic. For example, it is unlikely that, in most cases, complying with routine reporting and recordkeeping requirements, such as those required by the EEOC or by state agencies monitoring public fundraising, would influence or jeopardize religious doctrine.[156] Nonetheless, Laycock explains, broad protection is necessary because the development of doctrine is such an amorphous process that determining what government actions will induce changes is "too unpredictable [to be resolved] on a case-by-case basis."[157]

It is inviting to criticize this indirect theological effect thesis on the ground that it deals only with speculative harm and is therefore too attenuated a construct.[158] This criticism, however, would be misguided. The basic thrust of the indirect effect theory is that theological development is a process. Thus, any interference with that process is an actual infringement on theological concerns.

The better response to this theory is that theological development is not itself theology, or, even if it is theology, ephemeral development of doctrine cannot properly be held to be within the ambit of first amendment protection. An equally persuasive argument is that the genesis and development of theological principles is a process no different from the development of political, artistic, or literary ideas in the secular world. The mere fact that secular affiliations or organizations may develop ideas through the interactive process does not embue these groups with constitutional interests.[159] Indeed, even direct and conscious attempts by the press to advance and disseminate ideas through information gathering has been held unentitled to special first amendment protection.[160] The proposition, then, that the process of theological development should be singled out for special treatment appears to be without justification.[161]

Perhaps the best refutation of the indirect theological effect position, however, rests with the premise itself. Once the assumption is made that the process of theological development must be protected, the argument becomes too broad to be meaningful. Undoubtedly, any government action, be it regulation of a religious entity, the use of nuclear weapons, or laws against discrimination, can be a stimulus

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155. *See* Laycock, *supra* note 136, at 1391.

156. *Cf.* Tony and Susan Alamo Found. v. Secretary of Labor, 105 S. Ct. 1953, 1964 (1985).

157. Laycock, *supra* note 136, at 1392.

158. *Cf.* Ripple, *supra* note 2, at 1217.

159. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (group of students sharing living quarters raises no constitutional interest); Roberts v. United States Jaycees, 465 U.S. 1077 (1984) (right of association not protected unless directly related to the advocacy of articulated positions); Hishon v. King & Spalding, 464 U.S. 959 (1984) (association within a law firm raises no first amendment interest). *See also* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654 (1980).

160. *See* Pell v. Procunier, 417 U.S. 817 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972).

161. On rejecting the notion that religious ideas are entitled to greater protection than secular ideas, see Marshall, *supra* note 137, at 575–88.

to theological change and development. Indeed, government action influences philosophical and moral standards throughout society simply by its role and visibility in our culture.[162]

Religion, then, although it can and should be free from government coercion, cannot be insulated from government action that might affect religious values. This, of course, does not leave religion at the state's mercy. In the absence of coercion, the religious institution itself ultimately determines whether to be theologically influenced by governmental or societal action. This is the fallacy of the indirect effect argument. It seeks not to protect church from government, but rather to protect religious institutions from matters within their own volition.

Beyond a concern for theological development, the argument that all activities of religious institutions should be constitutionally protected has been supported by the principle of non-entanglement.[163] The non-entanglement position has obtained some measure of success in the Supreme Court. Codified in the third prong of the *Lemon* establishment test,[164] it has been used potently to invalidate a number of aids to parochial education,[165] although it has never been applied against a regulatory program. Non-entanglement also has occasionally surfaced as a free exercise concern in some cases, and in the writings of commentators.[166]

When the Court first applied the test in *Walz v. Tax Commission*,[167] entanglement appeared to represent two distinct concerns. First, the inquiry into the degree of government involvement with religion was intended to enforce the second or effect prong of the then-existing establishment test. As the *Walz* Court stated, it "must also be sure that the end result—the effect—is not an excessive government entanglement with religion."[168] Second, and more broadly, the entanglement concern was presented as a natural development of the Court's struggle "to find a neutral course between the two Religion Clauses . . . ."[169] Minimizing a "continuing day-to-day relationship" between church and state became a method of steering between the dual proscriptions of sponsorship and interference toward a policy of neutrality.[170]

Although some commentators have objected to the use of entanglement as a separate constitutional test,[171] the notion that church-state entanglement may raise establishment effects concerns is not controversial. As the Court explained in *Lemon v. Kurtzman*, entanglement may provide an early warning for potential violations of

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162. T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935); M. EDELMAN, THE SYMBOLIC USES OF POWER 105–27 (1964); Bellah, *Civil Religion in America*, in RELIGION IN AMERICA (1968). For an analysis of the role of Court and Constitution in influencing our societal values, see Lerner, *Constitution and Court As Symbols*, 46 YALE L.J. 1290 (1937); Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123.

163. *See* Esbeck, *supra* note 1, at 382.

164. *See supra* notes 26–27 and accompanying text.

165. Aguilar v. Felton, 105 S. Ct. 3232 (1985); Wolman v. Walters, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).

166. *See* Laycock, *supra* note 136, at 1384; Serritella, *supra* note 12, at 144–60.

167. 397 U.S. 664 (1970). *See supra* notes 28–31 and accompanying text.

168. *Id.* at 674.

169. *Id.* at 668.

170. *Id.* at 674.

171. *See* Aguilar v. Felton, 105 S. Ct. 3232, 3248 (1985) (O'Connor, J., concurring). *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673–74 (1980).

the effect test.[172] In this respect, entanglement is particularly pertinent in cases where "government support . . . comes with strings attached."[173] *Lemon* was such a case. There, the Court considered two private school aid programs, one in Rhode Island, the other in Pennslyvania. Both programs provided direct financial support for teachers at elementary and secondary schools. In Rhode Island, the statute authorized the state to supplement the pay of parochial school teachers who taught secular subjects.[174] Under the Pennslyvania statute, the state attempted to reimburse nonpublic schools for the costs of educating their students in secular courses by purchasing instruction from those schools in science, math, language, and physical education courses. In both cases, in order to ensure that state funds were applied only to secular matters, the schools were required to account separately for their expenditures in teaching the secular subjects and to allow state auditing of those records.[175] The Court found these "enforcement" provisions to be constitutionally objectionable under the entanglement inquiry.[176]

The use of entanglement analysis in cases like *Lemon*, when ongoing state supervision is required, has a sound foundation. When government support and control are inextricably linked in the challenged government enactment, it seems "natural to review support and control as a package . . . ."[177] The fact that government imposes and enforces limits on the aid does little to remove the symbolic union of church and state thought to connote establishment.[178] Indeed, when regulations intertwine government and religion in a program designed to benefit religion, the effect may be to send a more powerful message of state endorsement of religion than might occur from aid alone. More importantly, however, the establishment problem in *Lemon* and its progeny is in the aid, not the regulation.[179] Thus, the justification for entanglement analysis of regulatory issues must lie elsewhere.

One possibility is the second theme of *Walz*[180]—that entanglement is a product

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172. 403 U.S. 602, 624–25 (1971); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); Ripple, *supra* note 2, at 1197 (arguing that the nonentanglement doctrine as used in *Walz* might have been construed as a "pragmatic rephrasing of the 'primary effect' test").

173. Laycock, *supra* note 136, at 1382.

174. 403 U.S. 602, 607 (1971). The teachers were eligible to receive direct payments of up to 15% of their annual salary, so long as the salary did not exceed the maximum paid to public school teachers. However, teachers were not eligible for the supplements if the private school's average per-pupil expenditures on secular subjects exceeded comparable figures for public schools. *Id.*

175. *Id.* at 620.

176. *Id.* at 621–22. Other cases have invalidated similar enforcement provisions under the *Lemon* reasoning. In Meek v. Pittenger, 421 U.S. 349 (1975), Pennsylvania's program for supplying remedial and accelerated instruction, as well as guidance counseling, to students in the non-public schools was invalidated because the state would have had to assure that the teachers would "play a strictly non-ideological role." 421 U.S. 349, 371 (1975). In Wolman v. Walter, 433 U.S. 229 (1977), the Court again used entanglement grounds to invalidate Ohio's provision of field trip transportation and services to non-public schools. Again, because non-public school teachers would be on the buses taking children between school and their destination, the state would have to assure secular use of the field trip funds. 433 U.S. 229, 255 (1977). Most recently, the Court invalidated New York's use of federal funds to supply remedial instruction to low-income, educationally disadvantaged children because the instruction would take place in private schools and the publicly paid teachers would have to be policed to assure that their message was devoid of religious content. Aguilar v. Felton, 105 S. Ct. 3232, 3238 (1985).

177. Laycock, *supra* note 136, at 1383 (noting the doctrinal confusion that has resulted).

178. *See* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3226–27 (1985).

179. Laycock, *supra* note 136, at 1383.

180. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

of the Court's attempt to find a neutral path between establishment and free exercise. If so, it reflects a basic, structural concern about the general relationship of church and state. It does not focus upon protecting government from religion or religion from government. Instead, the Court's approach in *Walz* tends to equate separation with neutrality, thereby making the degree of separation a litmus for compliance with the dual commands of the religion clauses. There is little wonder, therefore, that some commentators have criticized this application of entanglement as potentially, and incorrectly, representing "the full meaning of the religion clauses."[181]

The separation test, however, which ostensibly embodies the commands of both clauses, provides no support for applying either clause to any aspect of the church-state relationship. As a measure of neutrality, entanglement does little to aid assessment of whether a church is being supported by the state or hindered by it. Each possibility is a distinct question. Consequently, the substitution of entanglement considerations for neutrality analysis provides no support for applying the establishment clause to cases involving regulation of religiously affiliated organizations.

Constitutional values must be more clearly identified in order to support the claim for exemption. Several have been advanced. The strongest of these invokes both free exercise and establishment concerns in attacking regulatory programs which allow the state to determine whether certain activities are religiously based. In *Catholic Bishop*,[182] for example, the concern was raised that the NLRB would at times be placed in a position to evaluate when the allegedly unfair labor practice of a religious school was based on religious beliefs.[183] Arguably, this inquiry raises establishment concerns on the grounds that the state has no competency to make theological determinations.[184] It potentially also raises free exercise concerns, in that a wrong determination by the state may violate free exercise principles.[185]

As we have seen, the claim that inquiry itself may raise a constitutional violation was apparently rejected in *Dayton Christian Schools*.[186] Nonetheless, it is a claim that had previously enjoyed some support in the case law, and because of the ambiguous nature of the *Dayton Christian Schools* holding, should still be addressed.[187] In parochial aid cases, for example, it has played a major part in the invalidation of programs which require a state to monitor religious school expenditures in order to ascertain when the monies were devoted to secular or sectarian purposes.[188] Outside the realm of the aid cases, constitutional limitations on state involvement in religious doctrine have again been imposed. Cases involving intrachurch disputes over

181. Laycock, *supra* note 136, at 1379; Ripple, *supra* note 2, at 1213–14.

182. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). *See supra* notes 35–50 and accompanying text.

183. *Id.* at 502.

184. Jones v. Wolf, 443 U.S. 595 (1979).

185. Laycock, *supra* note 136, at 1400–01.

186. *See supra* notes 71–88 and accompanying text.

187. *Id.*

188. *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

property[189] are principal examples of the courts' lack of authority under the first amendment to resolve church property disputes on the basis of religious doctrine.[190]

The property dispute cases are enlightening, however, in that they show that limitations upon inquiry into church doctrine are not absolute. The courts may not resolve doctrinal disputes but they may apply "neutral principles of law"[191] to resolve litigation, even if this application "requires a civil court to examine certain religious documents" in order to reach its conclusions.[192] As the Court in *Jones v. Wolf* stated, the neutral principles inquiry "cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods."[193] The point of *Jones* appears to be that, while the state may not make a theological determination on behalf of the church, it may inquire, based upon secular analysis, whether the church's theological position governs the disputed issue. Simply stated, the distinction is between the prohibited determination of what is religiously correct and the more limited, constitutionally permissible inquiry into the nature of the religious claim.

The property cases, then, ultimately show that the Constitution does not prohibit all government inquiry into the nature of a religious belief. Though it may well be "a sensitive and unwelcome task,"[194] this inquiry is one that essentially is inescapable. Even creating a religious exemption from regulatory enactment will not eliminate all inquiry, since the issue of whether an organization may be defined as religious must be decided in any event to determine whether the organization is entitled to the exemption. Similarly, in a free exercise challenge, the issue of the existence of religious belief and sincerity must be determined in order to decide the merits of the free exercise claim. If state or court inquiry into religious beliefs is entanglement, then it is an entanglement that is required by the first amendment.[195]

The impermissible inquiry claim then, can only seek to minimize the frequency of court determination of religious issues. This may be of value, as one of us has previously suggested.[196] But avoiding inquiry itself cannot be constitutionally determinative. At best it represents a legitimate policy interest under which the state

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189. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969).

190. An early property dispute between pro- and anti-slavery factions, involving the right to control a local Presbyterian church, was decided on federal common law grounds before the first amendment was held applicable to the states via the fourteenth amendment. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). Since *Watson*, the limitation on government intrusion into religious doctrine in intrachurch property disputes has occasionally been held to stem from the first amendment generally. *See* Jones v. Wolf, 443 U.S. 595, 605 (1979). In other cases, the limitation is said to derive from the free exercise clause. *See* Serbian E. Orthodox Diocese, 426 U.S. 696 (1976). *See also* Jones v. Wolf, 443 U.S. 595, 616 (1979) (Powell, J., dissenting) ("Because of the religious nature of these disputes, civil courts should decide them according to principles that do not interfere with the free exercise of religion in accordance with church policy and doctrine.").

191. *See* Jones v. Wolf, 443 U.S. 595, 606 (1979). *See also* Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980).

192. Jones v. Wolf, 443 U.S. 595, 604 (1979).

193. *Id.* at 606.

194. Choper, *supra* note 171, at 683.

195. *Id. See generally* Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979).

196. *See* Marshall, *supra* note 137, at 545, 589 (1983).

might exempt religious organizations from some regulatory requirements if it so chooses.[197] Indeed, perhaps this is the true significance of the Court's tortuous statutory construction in its *Catholic Bishop* decision.

Other entanglement rationales that have been posited to support protection of all church activity are similarly unconvincing. One theory argues that requiring religions to comply with governmental regulatory efforts is inappropriate because religious institutions should not be accountable to a secular authority. As Dean Kelley and Professor Marvin Braiterman have argued with respect to reporting requirements:

> [Mandatory disclosure] is pernicious because it encourages in the public mind the erroneous notion that religious organizations are obliged to account to the public or to a public official for their beliefs or their activities. Certainly religious groups ought to be accountable, and they are, but not to the public or to public officials. They are accountable to their members and contributors.[198]

An immediate difficulty with Kelley's and Braiterman's argument is that in many cases it is descriptively inaccurate. Particularly with regard to fundraising, the religious ministry is often not accountable to a private membership. Most, if not all, fundraising consists of pleas to the general public. Should these organizations be unaccountable to the public, they would not be accountable at all.

The accountability argument also dramatically overstates the case. At some point, religious organizations must become accountable for at least some of their actions. Kelley and Braiterman, for example, do not argue that religion should be exempt from the normal processes of the criminal law.[199] Thus, the question is not whether religious organizations should be accountable; it is where the line of accountability should be drawn.

Finally, while religious organizations should not be accountable to the public for their beliefs, it does not follow that it is pernicious for those groups to be accountable to the public for their non-religious activities. In fact, the argument could be made that it is pernicious to encourage in the public mind the concept that one can escape various forms of regulation in the name of religion. The suggestion that a ready-made loophole exists for those who wish to describe themselves as religious adherents is not only damaging to governmental interests, but it is detrimental to religion as well.[200] The increasing proliferation of dubious religious claims of exemption from taxation or other regulatory requirements has probably done as much damage to the image of religion as it has to undercut the enforcement capabilities of the challenged governmental program.[201]

A final entanglement rationale suggests that minimizing the contacts between church and state by exempting the former from the regulatory process eliminates

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197. *Id.* at 583 n.200.

198. Braiterman & Kelley, *When Is Governmental Intervention Legitimate?*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 170, 184 (D. Kelley ed. 1982).

199. *Id.* at 171.

200. *See* Bagni, *supra* note 195, at 1542. *Cf.* United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968).

201. *Compare* More v. CIR, 774 F.2d 570, 571 (1985) in which Judge Kaufman rather resignedly states, "Each year, with renewed vigor, many citizens seek sanctuary in the free exercise clause of the first amendment. They desire salvation not from sin or from temptation, however, but from the most earthly of mortal duties—income taxes."

friction between the two domains. Even this goal does not inevitably require regulatory establishment protections. First of all, in a complex society, some contact betwen church and state is inevitable.[202] Since this goal does not support a claim for full separation, the issue is where to draw the line. Moreover, excluding religion from regulatory programs applicable to other segments of the society can create new problems. Favored treatment, or what is perceived as favored treatment, creates resentment. Indeed, some commentators believe that it is exemption from regulatory programs that creates the true establishment concern.[203]

More importantly, if the elimination of friction between church and state were to become enshrined as a constitutional principle, the detrimental effect would probably be greater on religion than on the state. The logical extension of the separation principle would "prevent religious people and organizations from participating in the political process in any way."[204] Notably, many Supreme Court discussions of religious strife and divisiveness have occurred in cases in which the political role of institutional religion was questioned under the general heading of "political entanglement."[205]

Ultimately, the argument fails because it miscomprehends the role of religious institutions in contemporary society. As noted in the next section, organized religion represents an increasingly pervasive force in all elements of the society, including politics, commercial enterprise, and social welfare. The separation model might apply if church activity were confined to the "hallowed precincts of chapel, croft and chantry,"[206] but it is one-sided at best to insist that legitimate state regulation must recede each time a religious organization extends its activity. The state does not create friction alone.[207]

III. Establishment As a Barrier to Regulation of Religious Institutions—The Countervailing Concerns

The previous discussion demonstrates the weakness of arguments for the application of the establishment clause to protect all activities of religious institutions from government regulations. While legitimate concerns surrounding the application of regulatory laws to religious institutions exist, the conclusion that these concerns

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202. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

203. Tribe, *Church and State in the Constitution*, in Government Intervention in Religious Affairs 31, 34 (D. Kelley ed. 1982). *See* Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791 (D. Utah 1984); Isaac v. Butler's Shoe Corp., 511 F. Supp. 108 (N.D. Ga. 1980); Anderson v. General Dynamics Corvair Aerospace Div., 489 F. Supp. 782 (S.D. Cal. 1980); King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). *See also* Miller, *Rendering Unto Caesar: Religious Publishers and the Public Benefit Rule*, 134 Penn. L. Rev. 433 (1986).

204. Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 Ariz. St. L.J. 677, 687 (1985). *See also* McDaniel v. Paty, 435 U.S. 618 (1978); Laycock, *supra* note 136, at 1379 n.62 and authorities cited therein. *But see* Esbeck, *Religion and a Neutral State: Imperative or Impossibility*, 15 Colum. L. Rev. 66 (1985).

205. Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971). *But see* Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980).

206. Kelley, *Introduction* to Government Intervention in Religious Affairs 3 (D. Kelley ed. 1982).

207. *See* Miller, *supra* note 203, at 433 ("Religion creates some of its most intractable problems for the State when it engages in commercial or other traditionally secular activities.").

warrant constitutional protection does not necessarily follow. The case against the regulatory establishment position, however, relies not only upon refutation of the arguments in its favor, but also on consideration of the harms to regulatory efforts and to other constitutional values that would occur if the regulatory establishment position was adopted.

A. *The Wall That Isn't—Religious Institutions in Contemporary Society*

The significance of the claim that all activities of religious institutions are entitled to constitutional protection cannot be understood without some understanding of the power and influence currently enjoyed by religious institutions in all aspects of society. To some degree, a complete depiction of "the religious empire"[208] cannot be drawn because of the secrecy surrounding most church holdings and financial operations.[209] Even so, the relatively limited available information offers staggering numbers and conclusions. The sheer magnitude of corporate religion alone would explain why governmental regulators have taken more than a casual interest. Church holdings are immense. Ten years ago the value of church-held tax-exempt property was estimated to be 155 billion dollars, and this value is increasing.[210] These holdings render a confrontation between land use regulators, local tax authorities, and churches virtually inevitable.[211]

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208. LARSON & LOWELL, THE RELIGIOUS EMPIRE 1 (1976).

209. *Id.* at 220. *See also* C. PALLENBERG, VATICAN FINANCES viii–xii (1971); *Power, Glory—and Politics*, Time, Feb. 17, 1986, at 67; Lindsey, *The Mormons: Growth, Prosperity and Controversy*, N.Y. Times, Jan. 12, 1986, § 6, at 38, col. 1.

210. LARSON & LOWELL, *supra* note 208, at 3–4.

211. This Article does not extensively discuss the land use regulation cases, because they have been analyzed only infrequently under establishment principles. However, the importance of churches as property holders cannot be denied. In large measure, the constitutional principles controlling disputes between church and state regarding the use of property have been settled. Nondiscriminatory regulations applied to church construction generally have survived challenges based on the religion clauses. *See, e.g.*, Medford Assembly of God v. City of Medford, 695 P.2d 1379, 72 Or. App. 333 (1985), *cert. denied*, 106 S. Ct. 570 (1985) (holding that requiring a church to obtain a conditional use permit before operating a school does not infringe upon church's free exercise of religion; thus, state need not demonstrate a compelling interest); Lakewood, Ohio Congreg. of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983) (rejecting free exercise challenge to exclusion of new church construction in residential zone); Gross v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) (rejecting free exercise challenge to zoning ordinance that prohibited plaintiffs from using their residence for organized religious services); Corporation of the Presiding Bishop v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *appeal dismissed* 338 U.S. 805 (1949) (dismissing a free exercise challenge to a municipal zoning ordinance preventing the building of churches in certain areas, for want of a substantial federal question). *See also* Esbeck, *supra* note 1, at 398 n.309. Where the issue is the use of an existing church structure, courts have been less consistent in enforcing the applicable restrictions. *See, e.g.*, St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J. Super. 414, 479 A.2d 935 (Law Div. 1983) (permitting continued use of church shelter for the homeless despite failure to meet health and safety requirements applicable to commercial enterprises, based upon historical use of churches as sanctuary for the destitute). Other cases have upheld the requirement that churches obtain special use permits for intensive use of church-owned buildings in residential zones and have enforced residential covenants against church-held property. *See, e.g.*, Holy Spirit Ass'n for the Unification of World Christianity v. New Castle, 480 F. Supp. 1212 (S.D.N.Y. 1979); Ireland v. Bible Baptist Church, 480 S.W.2d 467 (Tex. Civ. App. 1972). Cases have also arisen in particularly contemporary contexts, such as historic preservation. *See* Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562 (1984) (arguing that the free exercise clause has been applied too narrowly, thus permitting the application of regulations in ways that implicate serious free exercise concerns). Recently, a district court ruled that the incorporation of an Oregon town, which consisted of land owned solely by a religious group, and which was established to serve the purposes of the group, was unconstitutional as a violation of the establishment clause. State v. City of Rajneeshpuram, Civ. No. 84-359 (D. Or. Dec. 10, 1985) (unreported transcript of Court's oral ruling).

The financial growth and commercial expansion of churches provide a fertile source of regulatory conflict. The Christian Broadcasting Network (CBN), begun in the 1960s, already has receipts from solicitations, sales, and other endeavors that amount to 233 million dollars per year; its success is paralleled by a host of other organizations riding the crest of television evangelism.[212] As long as twenty years ago, one writer reported that "sectarian groups . . . have taken deep plunges into profit-making businesses."[213] At the time, the holdings of various religious bodies included an orchestra hall, office buildings, a cement block factory, department stores, television and radio stations, a resort, a steel tube factory, a shopping center, a girdle factory, and the land under Yankee Stadium.[214] More recently, it was reported that the Unification Church held a ginseng tea company, a titanium firm, a machine tool and weapons manufacturer, a tuna fleet, fish-processing plants, a pharmaceuticals factory, and three daily newspapers.[215] The holdings of the Church of Jesus Christ of Latter-Day Saints also illustrate the growing role of churches as centers of economic power. In 1967, the church's Deseret Management Corporation, created to oversee its income-producing companies, had holdings including a hotel, a publishing company, a department store, several agri-businesses, real estate and investment operations, and radio and television stations from coast to coast.[216] More recently, Mormon assets were estimated to exceed five billion dollars.[217]

While the commercial holdings of religious organizations have spawned regulatory conflict,[218] commercial interest alone did not bring churches into the worldly sphere. Contemporary churches, increasingly, contribute community services.[219] In some instances, activities prompted by a sense of mission have resulted in church-operated facilities possessing the attributes and affecting the same public interests as state-operated social service agencies.[220] Child-care facilities,[221] homes

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212. *Power, Glory—and Politics*, Time, Feb. 17, 1986, at 67.

213. A. BALK, THE RELIGION BUSINESS 10 (1968).

214. *Id.* at 10–11.

215. *See* "Sun Myung Moon—Religious Martyr or Tax Cheat"?, U.S. News & World Report, May 28, 1984, at 14; "Moon's Japanese Profits Bolster Efforts in U.S.," Wash. Post, Sept. 16, 1984, at A1, col. 3.

216. A. BALK, *supra* note 213, at 10; R. GOTTLIEB & P. WILEY, AMERICA'S SAINTS: THE RISE OF MORMON POWER 105–14 (1984).

217. "Leaders of Mormonism Double As Overseers of a Financial Empire," Wall St. J., Nov. 9, 1983, at 1, col. 1.

218. The increasing proliferation of religiously operated enterprises is also evident in the diverse activities of the Tony and Susan Alamo Foundation. *See supra* notes 52–54 and accompanying text. *See also* State v. Sports and Health Club, 370 N.W.2d 844 (Minn. 1985), *cert. denied*, 106 S. Ct. 2718 (1986) (religiously operated health club denied exemption from state antidiscrimination law).

219. *See* Carlson, *supra* note 154, at 34; Esbeck, *supra* note 1, at 410.

220. Carlson, *supra* note 154, at 29–30; Esbeck, *supra* note 1, at 376; Kelley, *Introduction* to GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 3, 78 (D. Kelley ed. 1982).

221. Day care services operated by churches have experienced substantial growth. In 1982, a survey by the National Council of Churches revealed that more than 14,000 member-churches were directly responsible for the financing of daycare services. NAT'L COUNCIL OF CHURCHES, WHEN CHURCHES MIND THE CHILDREN 13 (1983). These services were available, in most instances, to the general public, not just to members of the sponsoring church. *Id.* Indeed, the NCC estimated that over a million children were enrolled in these centers. The estimate does not include children enrolled in facilities not affiliated with the NCC, which include the nation's two largest denominations, the Roman Catholic Church and the Southern Baptist Convention. Because child care implicates longstanding governmental interests, protecting the welfare of children "is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safe-guarded from abuses and given opportunities for growth into free and independent well-developed citizens." Prince v. Massachusetts, 321 U.S. 158, 165 (1944). One can expect increased urging for

for the aged,[222] and hospital facilities[223] are among the most familiar of these enterprises in which religious organizations engage, yet these areas have traditionally been the appropriate domain of government regulation.

The source of the most vitriolic confrontations, however, is likely to be the fundraising and political activities of contemporary religious organizations. Already the battles have begun over reporting and disclosure requirements.[224] The argument in favor of at least some accountability is strong. Religious organizations in this country traditionally have been the largest beneficiaries of private largesse.[225] Conservative estimates place contributions to those organizations in 1983 in excess of thirty-five billion dollars—over forty-seven percent of all charitable giving.[226]

The magnitude of the stakes involved, however, is not the only regulatory concern. Some of the strongest arguments in favor of disclosure requirements concern the fundraising techniques employed by some religious organizations. Fundraising no longer occurs solely within the membership and physical boundaries of the organized church. Organized fundraising through mass appeals has developed into a multimillion dollar industry. Religious organizations have become adept marketers of their message, increasingly using the direct-mail and broadcast techniques more frequently associated with commercial and political enterprises.[227] Many of the most successful fundraisers are so-called "electronic churches," using paid-time broadcasts or their own networks to solicit funds. It has been a successful endeavor. A recent study reported that the top four television ministries collectively took in more than a quarter of a billion dollars in 1980.[228]

These factors implicate three distinct regulatory interests. The first is the need to increase the flow of information to promote consumer-donor awareness. Here, the government interest is essentially the same as in political campaign regulation and a

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governmental regulation of all day care providers—including churches. *See, e.g.*, Congregation Beth Yitzchok v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (denying request of religious nursery school for preliminary injunction against enforcement of municipal regulatory ordinance).

222. Barr v. United Methodist Church, 90 Cal. App. 3d 259, 153 Cal. Rptr. 322 (1979); *see* Alton Newton Evangelistic Ass'n v. South Carolina Employment Security Comm'n, 326 S.E.2d 165 (S.C. App. 1985).

223. *See* St. Elizabeth Community Hosp. v. NLRB, 708 F.2d 1436 (9th Cir. 1983); Congregation Beth Yitzchok v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984); State v. Corpus Christi People's Baptist Church, 683 S.W.2d 292 (Tex. 1984).

224. *See* Larson v. Valente, 456 U.S. 228 (1982); Taylor v. City of Knoxville, 566 F. Supp. 925 (E.D. Tenn. 1982); Sylte v. Metropolitan Gov't of Nashville, 493 F. Supp. 313 (M.D. Tenn. 1980). Some commentators have suggested that churches need not be accountable to anyone but their members so long as their activities are lawful. *See* Braiterman & Kelley, *supra* note 198, at 184.

225. *See, e.g.*, GIVING U.S.A., ANNUAL REPORT 44 (1985) (indicating that since 1955 the largest single category of recipients of charitable contributions has been religious organizations).

226. *Id.* The figure is low because of the religiously affiliated institutions excluded from the estimate.

227. *See* Note, *Mail Order Ministries: Application of the Religious Purpose Exemption Under the First Amendment*, 17 J. MAR. 895, 912 (1984); *Power, Glory—and Politics*, Time, Feb. 17, 1986, at 62–69. Some churches use even more enterprising techniques—including illegal casino gambling games—to obtain funds. One author labeled churches "perhaps the principal proponents of gambling as a fundraising device." C. BAKAL, CHARITY U.S.A. 333 (1979). The same author has reported that some of New York City's houses of worship make as much as fifty million dollars a year through these illegal games. *See also* J. GOLLIN, WORLDLY GOODS 62–63 (1971).

228. J. HADDEN & C. SWANN, PRIME TIME PREACHERS 109 (1981). Another study has concluded that the aggregate operating budgets of the top five television ministries is approximately 500 million dollars per year. *Power, Glory—and Politics*, Time, Feb. 17, 1986, at 64.

host of consumer-oriented disclosure requirements.[229] The choice of donees will be affected by knowledge of how their money is spent. Without information, donors cannot evaluate the advisability of giving to a particular organization, cannot determine whether the money donated is utilized consistently with the donor's intent, and cannot intelligently choose between the different parties competing for their charitable dollars.[230]

Second, the use of airwaves implicates the regulatory interests of the Federal Communications Commission. The courts have permitted a greater degree of conflict with traditional first amendment principles when the broadcast media are involved than when any other form of communication is in issue, because the number of available frequencies is limited and federally licensed broadcasters are "public trustees."[231]

Third, the state has an interest in the deterrence and punishment of fraud. Religion, like the secular world, has had its share of chicanery, often amounting to considerable sums. Radio and television solicitations have triggered allegations of fraud,[232] frequently suggesting that moneys collected in over-the-air appeals have been diverted to purposes other than those for which they were publicly solicited.[233] Television is not the only medium that has been abused by persons seeking religious contributions. In 1978, the Roman Catholic Pallottine Order, using annual direct mail fundraising techniques, spent less than four cents of each dollar it raised for the stated solicitation purpose.[234]

It is important to observe that fraud cannot be curbed simply by the use of criminal prosecution. Indeed, even proponents of exempting religion from civil regulatory requirements have acknowledged that insurmountable barriers often preclude sustaining criminal fraud convictions against fundraisers for a religious belief.[235] Reporting and disclosure requirements, then, may represent the only ways to deal with the fraud issue.

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229. *See* Braiterman & Kelley, *supra* note 198, at 180–83.

230. *See* Rakay & Sugarman, *A Reconsideration of the Religious Exemption: The Need for Financial Disclosure of Religious Fund Raising and Solicitation Practices*, 9 LOY. U. CHI. L.J. 863, 890 (1978) (concluding that discretionary disclosure by religious charities is insufficient protection for both the public and the beneficiaries of those charities). *But see* Braiterman & Kelley, *supra* note 198, at 181–84 (arguing that although a religious group's voluntary disclosure to its adherents may be appropriate, mandatory disclosure to government is never appropriate).

231. FCC v. Pacifica, 438 U.S. 726 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Brandywine-Main Line Radio v. FCC, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

232. Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984); SEC v. World Radio Mission, 544 F.2d 535 (1st Cir. 1976); People v. Le Grande, 309 N.Y. 420, 131 N.E.2d 712 (1956); People v. Estep, 346 Ill. App. 132, 104 N.E.2d 562 (1952), *writ dismissed*, 413 Ill. 437, 109 N.E.2d 762 (1952), *cert. denied*, 345 U.S. 970 (1953); Albert, *Federal Investigation of Video Evangelism: The FCC Probes the PTL Club*, 33 OKLA. L. REV. 782 (1980).

233. Albert, *supra* note 232, at 783.

234. C. BAKAL, *supra* note 227, at 103–04. *See also* Rakay & Sugarman, *supra* note 202, at 864. The revelation prompted calls for reporting requirements and internal reform within religious bodies. *Id.* at 864 n.7. Rakay and Sugarman suggest a more circumscribed reporting requirement than we believe is required and suggest that the establishment clause is applicable to their analysis. Rakay & Sugarman, *supra* note 230, at 886–89.

235. *See* Braiterman & Kelley, *supra* note 198, at 178–82; Esbeck, *supra* note 1, at 414–18; Comment, *Diversion of Church Funds to Personal Use: State, Federal and Private Sanctions*, 73 J. CRIM. L. & CRIMINOLOGY 1204, 1207–20 (1982). *See generally* Heins, *"Other People's Faiths": The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153 (1981).

The final noteworthy regulatory area raising church-state concerns involves the political process. Institutional religion's role in politics is increasing. Religious organizations have actively participated in political campaigns in efforts to help elect church-supported candidates and to defeat office-holders who do not share the churches' views.[236] Indeed, some analysts give religious activists credit for the margin of victory in recent congressional elections.[237] Activist religious organizations also have succeeded in placing religiously motivated planks in party platforms and religiously inspired referenda on the ballot.[238]

The financial involvement of religious institutions in the political process, made possible at least to some extent by the sophisticated use of fundraising techniques noted earlier, has increased as well. Religiously affiliated political action committees contributed over eight million dollars to 1984 federal election campaigns.[239] Some church related political organizations boast impressive budgets. The Moral Majority alone has a budget of approximately six million dollars a year.[240] The Alliance for Traditional Values, reportedly consisting of more than 100,000 member churches, has a budget of approximately two and one-half million dollars.[241]

This increased religious involvement in politics carries important implications. First, it suggests that separation of church and state is for many a one-way street. As Dean Kelley has explained, the current agenda of some religious groups is to "amplify the symbolic evidences of religious allegiance in public life in order to demonstrate the authority of God over the nation," while seeking to "press back . . . government efforts to oversee, regulate and restrict the activities of churches."[242] Second, some of the government's most important and direct interests in reporting and disclosure inhere in the electoral and legislative processes. The fairness and the voter awareness that these regulatory programs promote are essential to the integrity of the electoral and legislative processes.[243] Excluding one segment of participants by means of legislative exemption cuts at the very heart of the fairness those laws were designed to achieve.[244] Again, the state's legitimate interest in regulating religious institutions is indisputable.

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236. *Power, Glory—and Politics*, Time, Feb. 17, 1986, at 62; D'Antonio, *Onward, Christian Americans*, Cleveland Plain Dealer, Dec. 15, 1985, at C1, col. 3.

237. *See* D'Antonio, *supra* note 236, at C1, col. 5.

238. *Id.*

239. FEDERAL ELECTIONS COMMISSION, CONTRIBUTIONS TO 84 FEDERAL CAMPAIGNS BY PACS—1983–84 CYCLE.

240. D'Antonio, *supra* note 236, at C6, col. 1.

241. *Id.*

242. Kelley, *Introduction* to GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 9 (D. Kelley ed. 1982).

243. *See* Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981); Buckley v. Valeo, 424 U.S. 1, 64–68 (1976).

244. By no means are religious organizations unanimous in the contention that they should be exempted from regulation for their political activities. *See, e.g.*, "Link of Religion, Politics Debated," Wash. Post, June 16, 1984, at B6, col. 5–6 (reporting support by Lutheran Council spokesman for government regulation of church political activities). Others have argued that church pronouncements (including lobbying) on political issues of the day enjoy free exercise clause protection and should not be regulated. Caron & Dessingue, *IRC 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 181 (1985).

B. *The Inordinate Justifications Needed to Sustain a Government Regulation Under the Regulatory Establishment Theory*

Once the scope of activity of religious organizations in areas where the state has a legitimate and substantial regulatory interest is recognized, the pragmatic importance of the regulatory establishment claim becomes more apparent. It casts doubt on the validity of any state regulation, regardless of strong justifications for it, and turns any regulatory contact initiated by government, no matter how routine or unobtrusive, into a constitutional issue. Moreover, the recognition that church organizations act as secular groups and, indeed, often compete with those groups, leads inevitably to the conclusion that the regulatory establishment claim is essentially a claim for favoritism. Both points merit separate discussion.

At least under current doctrine, the contention that application of the establishment clause to regulatory issues would result in excessive protection for religious institutions cannot be denied. The establishment clause represents one of the few areas of constitutional litigation in which a challenged regulation cannot be upheld even if supported by a compelling state interest. Once an enactment has been deemed to violate any of the prongs of the *Lemon* test, the enactment is unconstitutional, regardless of its justification.[245] Thus, under current doctrine, to conclude that a government regulation implicates establishment clause concerns renders it per se unconstitutional.[246]

It might be argued that a compelling state interest component could be factored into the establishment inquiry.[247] However, this would present problems with respect to the continued validity of existing establishment jurisprudence. For example, little doubt exists that some of the enactments that previously have been struck down under the *Lemon* test would meet a compelling state interest requirement. A ready example in this regard is the Title I program administered by the City of New York, which provided assistance to low-income, educationally disadvantaged children. The program was struck down this past term in *Aguilar v. Felton*.[248] It is difficult to find a more compelling state interest than that supporting this particular program;[249] if a compelling state interest test were adopted, it would suggest, at the least, that *Aguilar* was wrong. But *Aguilar* does not stand alone.[250] Most forms of parochial aid could be supported under a compelling state interest formulation,[251] given the Court's

245. *See* Laycock, *supra* note 136, at 1386–87.

246. There is some suggestion in Larson v. Valente, 456 U.S. 228 (1982) that a compelling state interest test involves more rigorous review of a challenged enactment than does the *Lemon* test. In *Larson*, the Court invalidated a statute that purportedly repressed a denominational preference. Holding that preferences cut at the heart of the establishment clause, the Court applied a strict scrutiny analysis in which the statute would have to be narrowly tailored to further the state's compelling interests. *Id.* at 247. The Court's apparent intention was to subject the statute to the most exacting review because of purported harm to establishment values. The Court did not take into consideration, however, that unlike the *Lemon* test, a strict scrutiny examination can be overcome by a showing of compelling justification by the State. *Cf.* United States v. Lee, 455 U.S. 252 (1982).

247. Esbeck, *supra* note 1, at 376–77; Note, *Governmental Noninvolvement with Religious Institutions*, 59 TEX. L. REV. 921, 926, 943–45 (1981).

248. 105 S. Ct. 3232 (1985).

249. *See* Laycock, *supra* note 136, at 1387–88.

250. Meek v. Pittenger, 421 U.S. 349 (1975); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985).

251. Some, of course, might approve a doctrinal shift that would produce such a dramatic change in prior

acknowledgment that the interest in providing educational aid to all its citizens represents one of the state's highest priorities.[252]

This precedential obstacle perhaps could be avoided by manipulating the establishment inquiry further and applying a different standard to state action involving aid than to that involving regulation. A compelling interest inquiry could be limited solely to regulatory issues. The difficulty with this solution, however, is that if establishment is held to apply to both regulatory and aid programs, then the creation of an aid/regulation distinction has no justification—other than as a mechanism to distinguish previous cases.

In any event, the problem of applying establishment analysis to government regulatory programs runs far deeper than simply incompatibility with current doctrine. Even if a compelling interest test, applicable solely to regulatory establishment issues, could be worked into the jurisprudence, the effect on government regulatory efforts would be stultifying.

Some commentators, for example, suggest that the state's interest would not meet the compelling interest standard unless the religious organization's activity violates the criminal law.[253] This position, when examined in light of the regulatory establishment claim that inquiry into the activities or beliefs of a religious organization violates establishment principles, is even more absolutist than it initially appears, since it erects a constitutional shield against the investigatory stages of a prosecution.[254]

Moreover, constitutional limits on the scope of inquiry into the validity of a religious belief seriously reduces the possibility of successful prosecution even after a criminal action has been maintained. A jury trying a case in which the defendant is charged with fraudulently soliciting funds for faith healing, for example, may not question the reasonableness or credulity of a religious claim but may only question the defendant's sincerity.[255] Yet, as Justice Jackson has argued, how can a fact finder intelligibly evaluate the sincerity of religious belief without, to some degree, evaluating its believability?[256] The conclusion is that many activities, including those undeniably criminal, would escape prosecution if the regulatory establishment position is accepted.[257]

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decisions. The point here, however, is simply to emphasize the extent to which the regulatory establishment theory represents a serious departure from precedent.

252. *See* Brown v. Board of Educ., 349 U.S. 294 (1955).

253. Braiterman & Kelley, *supra* note 198, at 172.

254. *See, e.g.*, Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984) (rejecting free exercise challenge to FCC investigation of fraudulent solicitation practices); SEC v. Knopfler, 658 F.2d 25 (2d Cir. 1981) (rejecting first amendment challenge to government subpoena issued in connection with investigation of possible violations of federal securities laws); *In re* Rabbinical Seminary, 450 F. Supp. 1078 (E.D.N.Y. 1978) (rejecting free exercise challenge to government subpoena based on investigation of allegedly false statements made by church in connection with federal aid programs); Alberts v. Devine, 395 Mass. 59, 479 N.E.2d 113 (1985) (holding that first amendment does not bar judicial inquiry into church proceedings culminating in termination of minister, in order to determine whether termination was based on violation of physician-patient confidentiality). *See generally* Comment, *supra* note 235, at 1233–35.

255. United States v. Ballard, 322 U.S. 78, 84 (1944); Comment, *supra* note 235, at 1228–29; Heins, *supra* note 235, at 161–68.

256. *See* United States v. Ballard, 322 U.S. 78, 92–93 (1944) (Jackson, J., dissenting).

257. This has been acknowledged by advocates of constitutional protection. Esbeck, *supra* note 1, at 418–19; Braiterman & Kelley, *supra* note 198, at 181. These authors assert, however, that any risks of fraud are necessary in order to accommodate the constitutional interests.

A more moderate position exists. It has been argued that protecting all activities of religious institutions does not necessarily require absolute deference to them. Authors have suggested that courts should adjust the degree of protection accorded to religious institutions to reflect such variables as religious intensity,[258] whether the regulated activity is internal or external,[259] the intensity and frequency of the regulatory intrusion,[260] and the strength of the state's interest.[261] One difficulty with this approach is that it is inconsistent with the premises allegedly supporting the claim that all activities of religious organizations should be protected. For example, if the process of theological development is to be protected, and that process occurs in any church activity, how can some activities be held to be more protected than others? Similarly, if the purpose of constitutional protection is to prevent structural entanglement, can that goal be accomplished by adjusting scrutiny for levels of interaction, when any state/church contact fully implicates this concern?

More importantly, however, as a vehicle for inhibiting government action, the significance of characterizing any regulated activity as constitutionally protected cannot be overstated. Even if degrees of protection are somehow incorporated into a constitutional analysis, the existence of any first amendment interest demands exacting scrutiny of the challenged regulation.[262] Thus, even the recordkeeping requirements applied to businesses with a commercial purpose would require a rigorous constitutional balancing if the business was owned by a religious organization.[263] Moreover, the acceptance of a theory which posits that any contact creates a constitutional issue makes available to religious institutions a defense that can be raised at every stage of an enforcement proceeding—investigation,[264] adjudication,[265] and judgment.[266] The drain on state resources in such circumstances may well be insurmountable. Finally, a pragmatic view of constitutional adjudication demonstrates that once the Court determines the existence of a protected constitutional right it seldom, if ever, finds an overriding state interest.[267] In practical effect, then, if not in theory, according all religious activities constitutional status would virtually insulate them from the regulatory process. It would, in the words of one commentator "place such organizations in an 'above-the-law' position."[268]

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258. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Laycock, *supra* note 136, at 1403, 1409–11.

259. Laycock, *supra* note 136, at 1403–09.

260. Esbeck, *supra* note 1, at 376–79; Serritella, *supra* note 12, at 157.

261. Serritella, *supra* note 12, at 159.

262. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

263. *Compare* Tony and Susan Alamo Found., 105 S. Ct. 1953, 1964 (1985) (dismissing claim that FLSA recordkeeping requirements applied to commercial operations owned by religious foundation violated establishment clause).

264. Claims that investigation violates the establishment clause have been raised in Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984), and in EEOC v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982).

265. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

266. *Id.*

267. Marshall, *Discrimination and the Right of Association*, ____ Nw. U.L. REV. ____ (1986) (forthcoming). *But see* Korematsu v. United States, 323 U.S. 214 (1944).

268. *See* Note, *The Forbidden Fruit of Church-State Contacts: The Role of Entanglement Theory in Its Ripening*, 16 SUFFOLK U.L. REV. 725, 750 (1982). *But see* Braiterman & Kelley, *supra* note 198, at 188.

C. *Favoritism*

It is not only the public interest in government regulation that suffers harm by the conclusion that religious organizations are entitled to constitutional protection for all their activities. Secular segments of society also may be harmed. Whether a religious organization invests in a business, seeks legislative action, or promotes the candidacy of particular individuals for public office, it is engaging in an activity in direct competition with secular individuals and organizations. To exempt religious institutions from strictures governing these activities is to place those enterprises not excluded at a competitive disadvantage. Further, this exclusion and relative benefit expresses a policy of favoritism toward religious groups that may itself raise constitutional concern.

The favoritism concern is most evident with respect to those regulations affecting the political process, the media, or other channels for the dissemination of ideas. On one level, to grant religious proponents unencumbered access to those forums, while regulating their secular counterparts, creates a practical competitive advantage to the religious proponents, since the religious organization need not expend resources on regulatory compliance. Given two organizations with similar budgets, one religious and one secular, the former would have more funds to expend on the circulation of its views and the exertion of its influence—an extremely significant advantage given the Supreme Court's adage that "money is speech."[269] The effect, then, is to bestow upon those seeking to advocate religious ideas more power to do so. To equalize access to the marketplace of ideas, an advocate expressing secular concerns would need to raise more money and seek more support than would the religious proponent.

More troubling is that this specialized treatment for religious views confers upon them not only a practical advantage, but also "a special status in the marketplace of ideas."[270] This favoritism towards religious ideas is not supported by the Constitution; in fact, it is contrary to the fundamental policies of the speech clause. As has been explained, favoritism cuts at the very heart of the "equal liberty of expression guaranteed by the first amendment,"[271] by distorting the marketplace of ideas toward the favored view. This undercuts the central notion that the first amendment assumes every idea has equal dignity in the competition for acceptance and recognition.[272]

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269. Buckley v. Valeo, 424 U.S. 1, 16 (1976). *See* Marshall, *supra* note 125, at 582 n.196; Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1 (1976); Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

270. Marshall, *supra* note 137, at 583.

271. Karst, *Equality As a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975). *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). *See also* Widmar v. Vincent, 454 U.S. 263 (1982); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). *See also* Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

272. *See* Karst, *supra* note 271, at 23–26; Marshall, *supra* note 137, at 583. The free exercise clause does not provide an exception to the fundamental tenet. The cases uniformly reject the proposition that free exercise entitles

Importantly, the free exercise clause does not disturb the rejection of favoritism claims suggested by freedom of expression jurisprudence. Favoritism, whether or not it affects speech concerns, also conflicts with the philosophy of establishment itself. Freeing religious organizations from regulation provides a relative benefit for religion over nonreligion, which may raise establishment concerns.[273] Relative benefit, moreover, is not the only concern. As Judge J. Skelly Wright observed in addressing a claim that religious broadcasters should be exempt from FCC antidiscrimination provisions: "[S]ponsorship is what this exemption accomplishes. It is a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination to buy up pieces of the secular economy."[274] Finally, even the notion of voluntarism that has been presented as underlying the regulatory establishment position does not support the favoritism claim.[275] As Professor Giannella has explained, an important aspect of voluntarism is that different ideologies compete for adherents based on their merit.[276] Interpretations of the religion clauses which tend to allow favoritism can find no comfort in the constitutional proscription against establishment.

Indeed, the irony of the regulatory establishment position is that the favoritism created by exempting religious institutions from laws affecting all others would appear to raise the true establishment concern. After all, the policy against favoritism towards religion is one of the values appropriately associated with the establishment clause.[277] While this does not mean that all legislatively created exemptions in favor of religious organizations are unconstitutional, it does suggest that the argument that the establishment clause requires favoritism turns establishment analysis on its head.

In response to this point, it has been argued that exempting religious organizations from regulation does not express favoritism but is simply a logical extension of the rule that government may not aid religion. If the Constitution prohibits religious organizations from receiving aid, it is argued, it also appropriately immunizes them from government regulation.[278] This reciprocity contention has some intuitive appeal. If support is precluded because the organization is "too religious," it might be "too religious" to be regulated.

For several reasons, however, the apparent logic does not hold up to close analysis. Even if the contention that the establishment clause requires symmetry were

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religious speech to greater constitutional deference than secular speech. *See* Heffron v. ISKCON, 452 U.S. 640, 652–53 (1981); Prince v. Massachusetts, 321 U.S. 158, 164–65 (1944).

273. Miller, *supra* note 203, at 433. *See* King's Garden, Inc. v. FCC, 498 F.2d 51, 54 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). Barr v. United Methodist Church, 90 Cal. App. 3d 259, 274–75, 153 Cal. Rptr. 322, 333 (1979).

274. King's Garden, Inc. v. FCC, 498 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

275. Esbeck, *supra* note 1, at 369.

276. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513, 517 (1968).

277. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); P. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT (1962).

278. Esbeck, *supra* note 1. Pickrell & Horwich, *Religion As an Engine of Civil Policy: A Comment on the First Amendment Limitation on the Church-State Partnerships in the Social Welfare Field*, 44 LAW & CONTEMP. PROBS. 111, 122–23 (1981).

accepted, that clause does not create a strict no-aid rule.[279] In fact, court-approved state benefits aiding the missions of churches have taken a variety of forms, including some that have been held constitutionally required. The holding that states must permit children to satisfy mandatory education laws by parochial schooling, for example, confers an immeasurable benefit on the religious missions of churches.[280] Moreover, the financial aids to parochial schools that have been upheld in a number of cases again suggest that the no-aid, no-regulation symmetry is not as absolute as the reciprocity argument would maintain.[281] Indeed, if the reciprocity argument were applied literally, it would suggest, in light of the property tax exemption upheld in *Walz v. Tax Commission*,[282] that religious institutions may be regulated pervasively in their most religious sphere—the church itself. After all, the churches receive a huge benefit—suggested to be worth four billion dollars per year—through property tax exemptions.[283]

In any event, the premise of the reciprocity argument is flawed. There is no clear reason why there should be a reciprocal balance contained within the establishment clause. If anything, the far more likely candidate from which to correlate reciprocal burdens and benefits is the free exercise clause, since that clause has traditionally been used to impose burdens, while the establishment clause has placed limits only upon the benefits a government may confer on religious organizations.[284] Finally, a pure application of some symmetry notion can hardly be what advocates of church autonomy would seek. A logical extension of removing all government influence on religion may be the removal of all church influence over government. The establishment position, if accepted, may ultimately limit constitutional protection accorded religious institutions by demanding that they be prohibited from, or at least limited in, their political activity.[285]

IV. Government Regulation of Religious Institutions—The Appropriate Constitutional Inquiry

The conclusion is that protection for religious institutions from government regulation is not found within the establishment clause. Rather, any limits must be found in other constitutional provisions. Essentially, this position does not differ materially from the status quo. The confusion and doctrinal imprecision in this area, however, requires brief discussion of two further issues. First, since the proliferation of the establishment argument, particularly in its entanglement form, has infiltrated free exercise analysis, the independence of free exercise from those concerns must be

279. Walz v. Tax Comm'n, 397 U.S. 664 (1970); Committee for Pub. Educ. & Relig. Liberty v. Regan, 444 U.S. 646 (1979).

280. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Marshall, *supra* note 267, at _____(forthcoming).

281. Witters v. Washington Dep't of Servs. for the Blind, 106 S. Ct. 748 (1986); Wolman v. Walter, 433 U.S. 229 (1977); Committee for Pub. Educ. & Relig. Liberty v. Regan, 444 U.S. 646 (1979); Board of Educ. v. Allen, 392 U.S. 236 (1968).

282. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

283. Larson & Lowell, The Religious Empire 18 (1976).

284. *See supra* note 13 and accompanying text.

285. *See supra* notes 196–97 and accompanying text.

reiterated. Second, the role of establishment in regulatory cases, in contexts other than as a vehicle to require blanket exemptions, must be determined. We now turn briefly to these issues.

A. *The Role of Free Exercise*

The limits imposed on government regulation by the free exercise clause are more easily described than applied. Relative to the protections available through the application of an establishment theory, however, they clearly are more circumscribed. Protection for religious activity exists only if it can be shown that the regulation interferes with the practice of religious activities or violates matters of conscience.[286] This definition will not implicate many activities of religious institutions which are appropriate subjects of regulatory effort.[287]

The recognition of the relatively limited scope of constitutional protection available to religious organizations should have significant effect on future litigation. Most important would be the realization that no abstract constitutional interest in nonentanglement exists. This means, for example, that regulatory requirements should not be found unconstitutional because they might require the government or a court to determine whether the regulated activity is undertaken pursuant to religious calling. Governmental inquiry of this type is not unconstitutional entanglement; it is a necessary by-product of the desire to defer to religious-based decisions of the regulated organization.[288] Equally inappropriate are claims that regulatory requirements are unconstitutional because they hold religious institutions accountable or increase the contacts between church and state. There is no right, whether it be characterized as nonentanglement or otherwise, to be free from any and all government restriction.[289]

Determining which government regulations will survive the appropriate free exercise standard is not susceptible to definitive resolution, since traditional free exercise analysis is often fact-specific.[290] Nonetheless, some general observations are in order. First, government regulations such as employment discrimination or labor practice restrictions are not unconstituional simply because they subject religious institutions to agency jurisdiction. A constitutional issue exists only if an order of the regulatory agency violates religious exercise—as might occur by regulating employment decisions regarding ministers and clergy, whose positions are "inextricably

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286. Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981).

287. An expanded protection from state regulation for religious institutions, equivalent to that inherent in any establishment theory of constitutional protection could, of course, be accomplished through an expansion of the understanding of the role of free exercise. This is the position of Professor Laycock who, while rejecting a general right of religious institutions to be free from government regulation as a nonestablishment principle, argues that such a right is available to religious groups under a principle of church autonomy, which he finds embodied in the free exercise clause. *See* Laycock, *supra* note 116. Laycock's reasons for seeking an expansion of the rights of religious organizations beyond the limits currently recognized in free exercise analysis (other than his suggestion that the principle he advocates is grounded in constitutional text and Court doctrine) are substantially in accord with those supporting the establishment claim and have previously been addressed throughout this Article.

288. *See supra* notes 269–272 and accompanying text.

289. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, 106 S.Ct. 2718 (1986).

290. *See, e.g.*, Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981).

woven with worship and the practice of religion."[291] Recordkeeping and reporting requirements should also survive free exercise scrutiny, and therefore religion clause scrutiny, in most instances, since these restrictions would not likely interfere with religious tenets or practices.[292]

This does not mean that, in the absence of a free exercise claim, religious institutions will have no protection from government regulations. Solicitations, for example, are strongly protected by the speech clause.[293] Similarly, the right of association may protect a religious organization from complying with reporting requirements, if it can show that disclosure will create a risk that persons identified may be harassed, or that others may be inhibited from joining or contributing to the organizations.[294] Importantly, however, any protection extended under speech or association would not protect solely religious entities, as would a constitutional protection based upon principles of establishment or free exercise.[295]

Expanded protection for religious organizations may also be found under another associational theory as well—one which Esbeck terms "socio-political."[296] The socio-political theory posits that certain social sub-groups should be protected as organizations, since the existence of these "intermediate communities" preserves individual freedom by shielding individuals from the power of the state.[297] This argument has much force and, in other contexts, the Supreme Court has been quite sensitive to the need to defend groups and associations as means of promoting individual freedom.[298] Indeed, the case for the creation of constitutional protection for groups has received particularly powerful support from the writings of the commentators as well.[299] Again, however, the socio-political theory does not separate religious from nonreligious groups. As Esbeck acknowledges, secular groups, such as those based on ethnic or political alliances, are also intermediate communities, and accordingly should be protected under socio-political theory.[300] The socio-political theory, then, is a principle that supports increased protection for religious and nonreligious institutions both under the religion clauses.

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291. *See* Bagni, *supra* note 195, at 1544.

292. It has been argued, however, that reporting may offend certain religious tenets. *See* Petition for Certiorari, Faith Center, Inc. v. FCC, *petition for cert. filed*, 54 U.S.L.W. 3230 (U.S. Sept. 26, 1985) (No. 85–527), *cert. denied*, 106 S.Ct. 527 (1985), *reh'g denied*, 106 S. Ct. 900 (1986).

293. Secretary of State of Md. v. J.M. Munson Co., 467 U.S. 947 (1984); Schaunburg v. Citizens For a Better Env't, 444 U.S. 620 (1980).

294. *See* Brown v. Socialist Workers, 459 U.S. 87 (1982); NAACP v. Alabama, 357 U.S. 449 (1958).

295. Esbeck raises fear of threat from government as an argument in favor of protecting religious organizations under a regulatory establishment theory. Esbeck, *supra* note 1, at 374. He does not raise the possibility that a right of association would serve equally to protect religious organizations in this circumstance.

296. Esbeck, *supra* note 1, at 369–70.

297. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 974 (1978); R. NISBET, THE QUEST FOR COMMUNITY (1968); Garet, *Communality and Existence: The Rights of Groups*, 56 USC L. REV. 1001, 1035 (1983); Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1881 (1985).

298. Roberts v. United States Jaycees, 465 U.S. 1077 (1984).

299. *See* Garet, *supra* note 297.

300. Esbeck, *supra* note 1, at 369–70.

B. *The Limited Role of Establishment*

1. *Exemptions for Religious Institutions*

A highly troublesome question is whether exemptions from regulatory programs themselves violate the establishment clause. The Court has yet to invalidate a blanket regulatory exemption for all religious organizations as an improper establishment.[301] In *Walz v. Tax Commission*,[302] for example, the Court upheld the property tax exemptions for religious institutions. More significantly, in *NLRB v. Catholic Bishop of Chicago*,[303] and *Larson v. Valente*,[304] the Court construed challenged statutes to create exemptions for religious institutions from government regulation.

The limited trend, evident in these cases, toward approval of exemptions represents sound policy. Exemptions from regulatory programs, since they do not involve affirmative aids or subsidies, generally do not connote endorsement. This is particularly true when legitimate policy considerations justify a legislative decision to remove religious institutions from regulatory purview.[305] Laycock is assuredly correct, in at least some circumstances, in his assertion that "the state does not support or establish religion by leaving it alone."[306]

Nonetheless, it is equally clear, as our previous discussion of favoritism indicates, that in some circumstances exemptions can raise establishment concerns, especially with respect to those regulations affecting the political process, the media, and other avenues for the dissemination of ideas. In those areas, leaving religion alone inappropriately confers a special benefited status upon religion in the "marketplace of ideas"—a status that offends both establishment and freedom of expression interests.[307]

Exemptions may raise establishment concerns in other regulatory areas as well. Exemptions of religiously owned enterprises from business or employment regulations may provide religious groups with competitive advantages that may harm their secular competitors. Perhaps this problem may be best addressed by equal protection analysis, as one court has suggested,[308] but to the extent that exemptions augment the ability of religious organizations to exert influence in the secular world, they raise establishment concerns beyond simple competitive advantage. Judge Wright's observation that exemptions may be a sure formula for concentrating and extending the worldly influence of religious sects, indicates establishment issues may arise even in commercial contexts.[309] The difficulty arises with determining whether the exemption is an appropriate accommodation of church and state or is instead an

301. In Larson v. Valente, 456 U.S. 288 (1982), the Court struck down a provision which exempted some, but not all, religious organizations.

302. 397 U.S. 664 (1970).

303. 440 U.S. 490 (1970).

304. 456 U.S. 288 (1982).

305. Marshall, *supra* note 137, at 546.

306. Laycock, *supra* note 136, at 1416.

307. *See supra* notes 269–70 and accompanying text.

308. Milwaukee Montessori School v. Percy, 473 F. Supp. 1358 (E.D. Wis. 1979).

309. *See supra* note 274 and accompanying text quoting King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974). *See also* Miller, *supra* note 203.

unconstitutional "formula" of the type noted in Judge Wright's opinion. For our purposes it is sufficient to conclude that exemptions may raise establishment problems but do not do so in every circumstance. Some accommodation is permissible.

2. *Preferential Treatment*

A less troublesome issue is whether regulatory programs which exempt some, but not all, religious organizations raise establishment concerns. Some direction on this issue has been provided by the Supreme Court. In *Larson v. Valente*[310] the Court, relying on the establishment clause, struck down a Minnesota regulation governing charitable fundraising by religious institutions on the grounds that it exempted some, but not all, religions.[311] Applying a strict scrutiny analysis, the Court found that the line the state drew between exempted and non exempted religions was not appropriately tailored to meet the state's interest and could be viewed only as preferring religions which the state exempted over those the state did not exempt.[312] As such, it violated the proscription of preferential treatment mandated by the establishment clause and was therefore constitutionally infirm.[313]

Professor Laycock argues that the establishment clause is not the proper vehicle to review regulations that have disparate effects on religious organizations. Rather, he suggests free exercise or equal protection as more appropriate standards of review.[314] We disagree. First, free exercise analysis would not reach many disparate treatment cases. As we have seen, free exercise requires a showing that the challenged regulation affects the exercise of religion. In *Larson*, for example, this would mean that the regulated organization would have to establish that the reporting and record keeping requirements imposed by the Minnesota statute infringed upon its religious exercise, a showing that would be at best difficult to make. Laycock himself avoids this problem by holding any activity undertaken by religious organizations to be protected by free exercise. But if his premise as to the scope of free exercise is rejected, as we suggest, then the conclusions as to its role in disparate treatment cases must fall as well.

There is a stronger case for utilizing equal protection analysis to invalidate governmental regulations which discriminate between religions, and it is likely that if that provision were made the governing inquiry, little or no difference in case results would occur. Not surprisingly, however, the equal protection clause has never been utilized by the Court in disparate treatment cases; indeed, the closest it has come to this approach is a casual remark in *New Orleans v. Dukes*[315] that religion is a suspect class entitled to strict scrutiny in equal protection analysis.[316] However, our

310. 456 U.S. 228 (1982).
311. *Id.* at 246.
312. *Id.* at 246–51.
313. *Id.* at 255.
314. Laycock, *supra* note 136, at 1382.
315. 427 U.S. 297 (1976).
316. *Id.* at 303.

rejection of equal protection as the governing inquiry has less to do with the meaning of equal protection than it does with the central meaning of establishment. One of the least disputed purposes of the establishment clause is to proscribe denominational preferences. As the Court appropriately declared in *Larson*, "The clearest command of the Establishment Clause is that one denomination cannot be officially preferred over another."[317] To the extent that the government enacts a preference in any form, be it in affirmative support or by a regulatory exclusion, it violates this essential establishment tenet.[318] It is therefore appropriate that these cases be decided under establishment principles.

Indeed, this conclusion is in a large sense a reflection of the central position of this Article. The constitutional meaning of establishment is consistent with what the word itself connotes—benefit, endorsement, and aid. To regulate is not to establish.

317. 456 U.S. 288, 244 (1982).

318. For an instance when an arguable discrimination between religious beliefs was held to be constitutionally permissible, see Gillette v. United States, 401 U.S. 437 (1971) (provision upheld which allowed conscientious objector status to dissidents who opposed all wars, not solely unjust wars).